

# ALTERING GENDER MARKERS ON GOVERNMENT IDENTITY DOCUMENTS: UNPREDICTABLE, BURDENSOME, AND OPPRESSIVE

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*Government-issued identity documents are used regularly by individuals to prove their identities. Individuals of trans experience<sup>1</sup> and nonbinary individuals who hold identity documents that do not match their gender identities may expose their transgender or nonbinary status, which can lead to harassment, discrimination, and violence. Onerous requirements imposed by some states make altering gender markers on identity documents nearly impossible for certain individuals. This article reviews the current state of affairs for nonbinary individuals and those of trans experience who seek to alter their gender markers, surveys three states with varying levels of rigidity, and investigates whether governing bodies are violating the Constitution by hindering their trans and nonbinary citizens' abilities to obtain accurate identity documents. Several progressive solutions are proposed as resolutions to this oppressive issue.*

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<sup>1</sup> Whenever possible, gender-neutral pronouns are used and the descriptor, "those of trans experience" is used to be as inclusive as possible.

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## INTRODUCTION

Identity documents are required to be used regularly by individuals of all genders and walks of life to prove identity. Driver licenses are commonly used by Americans to open bank accounts, start new jobs, enroll in school, and travel. Like cisgender individuals – those whose gender matches the one assigned to them at birth—individuals of trans experience and nonbinary individuals need accurate identity documents. Gender incongruent identification exposes transgender and nonbinary individuals to a range of negative outcomes, from denial of employment, housing, and public benefits to harassment and physical violence. Nevertheless, more than two-thirds of respondents (68%) to a recent survey conducted by the National Center for Transgender Equality (NCTE) reported that none of their identity documents display the name they prefer and the gender with which they identify.<sup>2</sup> This is likely because the gender marker change process is often complicated and can be cost-prohibitive. Further, because many states have intrusive and burdensome requirements, such as proof of surgery or court orders, it is nearly impossible for some transgender individuals to update their identity documents.

In response to discrimination and human rights violations faced by transgender and nonbinary individuals, a distinguished group of human rights experts from 25 countries developed and drafted the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity (“the Yogyakarta Principles”).<sup>3</sup> These Principles promise a future in which individuals “of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights,” where they can “enjoy all human rights without discrimination on the basis of sexual orientation or gender identity,” and in which they will benefit

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<sup>2</sup> SANDY E. JAMES, JODY L. HERMAN, SUSAN RANKIN, MARA KEISLING, LISA MOTTET & MA’AYAN ANAFI, NATIONAL CENTER FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 7 (2016), <http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf> [<https://perma.cc/JH9Z-P3Z8>] [hereafter THE 2015 SURVEY].

<sup>3</sup> THE YOGYAKARTA PRINCIPLES: PRINCIPLES ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY 6–7 (2007), [http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles\\_en.pdf](http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf) [<https://perma.cc/R6NH-TFPT>].

from recognition before the law, a fair trial and an adequate standard of living, among other rights.<sup>4</sup> Germane to this subject is Principle Six: the Right to Privacy, which promises “the choice to disclose or not to disclose information relating to one’s sexual orientation or gender identity, as well as decisions and choices regarding both one’s own body and consensual sexual and other relations with others.”<sup>5</sup>

Administrative states should provide the opportunity for individuals of trans experience to alter their gender markers to allow them to keep private their transgender status. No third-party needs to know private information about an individual’s genitals, which is generally what an inaccurate gender marker on an identity document will disclose. At best, police, employers, bartenders, and Transportation Security Administration (TSA) agents may question whether an individual’s identity document is fake or whether the individual is impersonating someone. It is possible that an individual’s transgender status will be revealed, and, depending on their resident state’s surgery requirements, their medical history can be inferred therefrom. Most likely, harassment and discrimination will ensue. In November 2017, the Yogyakarta Principles plus 10 (YP+10) “emerged from the intersection of the developments in international human rights law with the emerging understanding of violations suffered by persons on grounds of sexual orientation and gender identity and the recognition of the distinct and intersectional grounds of gender expression and sex characteristics.”<sup>6</sup> Principle 31 states: “Everyone has the right to change gendered information in such documents while gendered information is included in them,” and, encouraging a self-determination model, urges states to “[e]nsure access to a quick, transparent and accessible mechanism to change names, including to gender-neutral names, based on the self-determination of the person.”<sup>7</sup>

Identity documents do not define gender identity—they merely disclose it—and thus there is no reason an individual should be forced to undergo any medical procedures, including Hormone Replacement Therapy (HRT) or Gender Confirmation Surgery (GCS), as a requirement for legal recognition of their true gender identity. Many government bodies require transgender individuals to undergo GCS, which is de-facto sterilization for some individuals, as a prerequisite for gender marker alteration on government identity documents. Most governing bodies have no process for nonbinary individuals to obtain a gender-neutral marker on their identity documents. These onerous requirements—or lack of direction on the subject—make identity document alteration for individuals of trans experience and nonbinary individuals unduly burdensome. Such a cumbersome process serves no state interest and may impinge on constitutional rights.

Following this introduction, Section I of this paper explores gender identity and issues faced by individuals of trans experience and nonbinary individuals. Section II covers the state interest in sex and gender, including a history of identity documents and a survey of recent trends. Section III describes individual interests, including an analysis of the difficulties transgender and nonbinary individuals face with inaccurate identity documents, as well as constitutional considerations. Section IV examines three states with different policies: Alabama, Montana, and

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<sup>4</sup> *Id.* at 10–14.

<sup>5</sup> *Id.* at 14.

<sup>6</sup> THE YOGYAKARTA PRINCIPLES PLUS 10: ADDITIONAL PRINCIPLES AND STATE OBLIGATIONS ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION, GENDER IDENTITY, GENDER EXPRESSION, AND SEX CHARACTERISTICS TO COMPLEMENT THE YOGYAKARTA PRINCIPLES (2017), [http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5\\_yogyakartaWEB-2.pdf](http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf) [<https://perma.cc/L4KB-FGJN>].

<sup>7</sup> *Id.* at 9.

Oregon. These states represent a broad spectrum: it is very difficult for a transgender or nonbinary individual in Alabama to change their identity documentation; Montana is the median on the difficulty scale; and in Oregon, it is relatively easy for an individual to change gender markers on identifying documents. Other states or countries are not thoroughly examined but may be mentioned to give an example of particularly progressive or discriminatory policies.

*A. A Brief History of Gender Marker Alteration in the United States*

The option to change gender markers on identity documents in the United States has become increasingly accessible for those of trans experience and nonbinary individuals over the past few decades. In 1987, the State of New York revised its Procedure 4335 and stopped requiring proof of surgery to change the gender marker on an individual's identification document.<sup>8</sup> The statement from the Commissioner of Motor Vehicles read, "based on Counsel's opinion, effective immediately, I am revising our policy to allow an applicant to submit evidence of medical, psychological, or psychiatric evaluation, with a medical determination that one gender predominates over the other," and that "such evidence will be acceptable as sufficient proof of true gender."<sup>9</sup> Similarly, Arizona instituted a new policy in 1995, allowing an individual to submit a letter from a physician stating that the individual is "irrevocably committed to the sex change procedure."<sup>10</sup>

Many states and the District of Columbia have been offering a simplified form for changing gender markers since the mid-2000s. Typically, the form is partitioned into two sections: the applicant fills out the top half with their personal information, including the gender designation they would like to see on their identification document; the administering physician or a mental health professional fills out the bottom half with their license number and checks the boxes to indicate they have been treating the applicant and that the applicant has undergone the appropriate clinical treatment for gender transition.<sup>11</sup> According to Lambda Legal, a national organization supporting LGBTQ+ individuals, the standardized forms help applicants avoid the "subjective determination of specific clerks who may not know the legal specifics or may have prejudices of their own."<sup>12</sup>

In June 2010, the State Department took a significant step forward in its policymaking and ceased to require proof of surgery for transgender individuals seeking amended passports and consular birth certificates, requiring instead a physician's letter stating that the individual has had, or is in process of having, "appropriate clinical treatment for transition to the updated gender (male or female)."<sup>13</sup> Following this policy change, the Social Security Administration, Department of

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<sup>8</sup> Memorandum from Patricia B. Adduci, New York State Commissioner of Motor Vehicles on Change in Required Documentation for Proof of Sex Change to All Issuing Offices (Apr. 29, 1987), available at [srtp.org/files/NY%20DMV%20Sex%20Change%20Policy.pdf](https://srtp.org/files/NY%20DMV%20Sex%20Change%20Policy.pdf) [<https://perma.cc/F7UK-2RUV>].

<sup>9</sup> *Id.*

<sup>10</sup> Ariz. Dept. of Transportation, Policy No. DL 400.15(IV)(A)(3)(b). This policy number may no longer be accurate.

<sup>11</sup> See, e.g., Washington State Dep't of Licensing, Change of Gender Designation Request in app.

<sup>12</sup> LAMBDA LEGAL, TRANSGENDER RIGHTS TOOLKIT: A LEGAL GUIDE FOR TRANS PEOPLE AND THEIR ADVOCATES 18 (2016), [https://www.lambdalegal.org/sites/default/files/publications/downloads/2016\\_trans\\_toolkit\\_final.pdf](https://www.lambdalegal.org/sites/default/files/publications/downloads/2016_trans_toolkit_final.pdf) [<https://perma.cc/5A2D-R5UH>].

<sup>13</sup> *Change of Sex Marker*, U.S. Dep't of State, <https://travel.state.gov/content/passports/en/passports/>

Homeland Security, Veterans Health Administration, and Office of Personnel Management also updated their policies to stop requiring proof of surgery to obtain gender marker changes.<sup>14</sup>

In March 2012, the Alaska Superior Court became the first to rule that the absence of a process to change an individual's gender marker on a driver license to match their "lived gender expression or identity" infringes on that individual's constitutional right to privacy because it threatens the disclosure of personal medical information.<sup>15</sup> As discussed herein, the court found that the DMV's absence of a policy on changing gender markers did not further the state's interest in accurate documentation and identification and, in fact, could result in inaccurate and inconsistent identification documents.<sup>16</sup>

In 2014, Oregon removed its surgery requirement for gender marker alteration on Oregon birth certificates, allowing individuals to obtain new birth certificates with a court ordered gender change.<sup>17</sup> Then, in a landmark decision in 2016, the state updated its licensing and identity documentation process to allow for an "X" option for nonbinary individuals and a new procedure for changing gender markers by self-affirmation alone. This recent policy progression began in April 2016, when Jamie Shupe petitioned the Multnomah County Court for a sex change to "non-binary."<sup>18</sup> The request was granted and during the public comment period in the six weeks following the Court's decision, the DMV collected 83 written and oral comments, 71 of which approved of making the change to allow the "X" option on Oregon identity documents.<sup>19</sup> Oregon's "X" option and self-affirmation procedures went into effect July 1, 2017, allowing individuals simply to go to a DMV office, turn in a completed application for a gender marker change, and pay the renewal or

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information/gender.html [https://perma.cc/29ER-YDAF].

<sup>14</sup> See TRANSGENDER RIGHTS TOOLKIT, *supra* note 12, at 18.

<sup>15</sup> *Id.*

<sup>16</sup> *K.L. v. State, Dep't of Admin., Div. of Motor Vehicles*, No. 3AN-11-05431-CI, 2012 WL 2685183, (Alaska Super. Ct. Mar. 12, 2012) (cast into doubt by *Carcaño v. McCrory*, 203 F. Supp. 3d 615, 647 (M.D.N.C. 2016) (holding, *inter alia*, that civil liberties organization, trans students, and employee of state university plaintiffs made a clear showing that they were likely to succeed on their claim that Part I of HB 2, requiring that multiple occupancy bathrooms and changing facilities must be designated for and only used by persons based on their biological sex, violates Title IX as interpreted by the United States Department of Education under the standard articulated by the Fourth Circuit, that they would suffer irreparable harm in the absence of preliminary relief, and that an injunction was in the public interest) ("regardless of whether the court finds the reasoning in *Love* and *K.L.* persuasive, the sex listed on a person's birth certificate does not appear to qualify for constitutional protection under *Walls*.") (referring to *Walls v. City of Petersburg*, 895 F.2d 188, 189–93 ("the Fourth Circuit's decision in *Walls* casts doubt on the validity of these cases in this circuit . . . [the] right to privacy protects only information with respect to which the individual has a reasonable expectation of privacy") and concluding that "individuals have no constitutionally-protected privacy interest in information that is freely available in public records"))).

<sup>17</sup> See generally *ID and Gender Marker Documents*, BASIC RIGHTS OREGON, <http://www.basicrights.org/know-your-rights/id-gender-marker-documents/> [https://perma.cc/7UTQ-4JSE].

<sup>18</sup> Corinne Segal, *Oregon Becomes First State to Add Gender-Neutral Option on Driver's Licenses*, PBS NEWS HOUR (June 15, 2017), <https://www.pbs.org/newshour/nation/oregon-nonbinary-gender-neutral-option-licenses> [https://perma.cc/X4B4-WPFA]. Meanwhile, a small group of people in California followed Shupe's lead by obtaining court orders that legally identify them as nonbinary. Sara Kelly Keenan became the first person in California – and the second person in the country – to do so. As of 2017, about 20 people in the U.S. were legally nonbinary, according to Douglas Lorenz, communications director for the Intersex and Genderqueer Recognition Project, which had advised about 20 people in legally changing their sex.

<sup>19</sup> *Id.*

replacement fee.<sup>20</sup> Within the first six weeks, more than 250 Oregonians had updated their identification documents to show the “X” option.<sup>21</sup> The state’s new policy is significant not just for individuals who desire a gender designation of X, but particularly for individuals of trans experience who may have limited access to medical providers who would write a letter on their behalf or fill out part of a simplified gender marker change form.

While Oregon was the first state to announce the self-affirmation and X gender designation options, Washington D.C. became the first jurisdiction in the United States to implement a similar policy in late June 2017, approximately one week in advance of Oregon’s procedural change. Working with the National Center for Transgender Equality (NCTE), the District implemented its self-certification procedure, which went into effect June 27, 2017. The new unspecified gender option (“X”) allows individuals to complete a Gender Self-Designation form, pay the applicable fees for a new license and have a new photograph taken.<sup>22</sup> Sheila Alexander-Reid, director of the Washington D.C. Mayor’s Office of LGBTQ Affairs, stated that “the new gender neutral identifier offers gender nonbinary District residents a gender designation that affirms who they are,” and that “the implementation of a gender neutral identifier is consistent with our D.C. values of inclusion and respect.”<sup>23</sup> Confirming that safety is a key part of gender markers on identity documents, Mayor Muriel Bowser stated, “the safety and well-being of all Washingtonians is my top priority, and whenever we are presented with an opportunity to improve the lives of residents and better align our policies with DC values, I will take it.”<sup>24</sup>

Following in Oregon and Washington D.C.’s footsteps, California legislators introduced a bill in May 2017 to add a nonbinary gender option to state identity documents. The text of SB 179, which was approved by both the state senate and assembly and signed into law on October 15, 2017, states, “[i]t is the policy of the State of California that every person deserves full legal recognition and equal treatment under the law and to ensure that intersex, transgender, and nonbinary individuals have state-issued identification documents that provide full legal recognition of their accurate gender identity.”<sup>25</sup> When the bill was officially signed into law by the governor, California

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<sup>20</sup> See Oregon Dep’t of Transportation, Application for Driving Privileges or ID Card in App.

<sup>21</sup> *More than 250 Oregon Residents Mark ‘X’ Gender on Licenses*, KGW NEWS (Aug. 11, 2017), <http://www.kgw.com/mb/amp/news/more-than-250-oregon-residents-mark-x-gender-on-licenses/463678815> [<https://perma.cc/B4RZ-3AQQ>].

<sup>22</sup> Gov’t of the District of Columbia Dep’t of Motor Vehicles, Procedure for Establishing or Changing Gender Designation on a Driver License or Identification Card, <https://dmv.dc.gov/sites/default/files/dc/sites/dmv/publication/attachments/DC%20DMV%20Form%20Gender%20Self-Designation%20English.pdf> [<https://perma.cc/64P3-A5AH>]. The Gender Self-Designation Form remains confidential and protected under the provisions of the Driver Privacy Protection Act. See *Gender Self-Designation Form*, Gov’t of the District of Columbia Dep’t of Motor Vehicles (June 13, 2017), <https://dmv.dc.gov/publication/gender-self-designation-form> [<https://perma.cc/NJ65-95VY>].

<sup>23</sup> Emanuella Grinberg, *You can now get a gender neutral driver’s license in D.C.*, CNN (June 28, 2017), <http://www.cnn.com/2017/06/27/health/washington-gender-neutral-drivers-license/index.html> [<https://perma.cc/25GW-QMWJ>].

<sup>24</sup> *Mayor Bowser Announces Addition of Gender Neutral Identifier to Drivers Licenses and Identification Cards*, Gov’t of the District of Columbia Dep’t of Motor Vehicles (June 23, 2017), <https://dmv.dc.gov/release/mayor-bowser-announces-addition-gender-neutral-identifier-drivers-licenses-and> [<https://perma.cc/SBQ2-ZEEA>].

<sup>25</sup> California’s Gender Recognition Act, SB-179 (2017), available at [https://leginfo.ca.gov/faces/billCompareClient.xhtml?bill\\_id=20170180SB179](https://leginfo.ca.gov/faces/billCompareClient.xhtml?bill_id=20170180SB179) [<https://perma.cc/8BWL-WSQW>].

became the first state “to enshrine a third gender category into law.”<sup>26</sup> Since 2017, several states have followed suit, either adding a nonbinary marker option or allowing for self-designation of gender change, or both.<sup>27</sup>

Similar policies or instances of self-reporting gender for those of trans experience and nonbinary individuals have existed in other parts of the world for more than a decade: Australia in 2003,<sup>28</sup> Nepal in 2011,<sup>29</sup> New Zealand in 2012,<sup>30</sup> the Netherlands<sup>31</sup> and various provinces of Canada on a rolling basis starting in 2015.<sup>32</sup> Like some U.S. states, Canada began issuing passports with an

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<sup>26</sup> James Michael Nichols, *California Becomes First State To Legally Recognize A Third Gender*, HUFFINGTON POST (Oct. 17, 2017), [https://www.huffingtonpost.com/entry/california-third-gender-option\\_us\\_59e61784e4b0ca9f483b17b9](https://www.huffingtonpost.com/entry/california-third-gender-option_us_59e61784e4b0ca9f483b17b9) [<https://perma.cc/499M-Y4DS>]. Over the same weekend, the governor signed legislation enabling individuals of trans experience to change their names while incarcerated. *Id.*

<sup>27</sup> See, e.g., NATIONAL CENTER FOR TRANSGENDER EQUALITY, HOW TRANS-FRIENDLY IS THE DRIVER’S LICENSE GENDER CHANGE POLICY IN YOUR STATE? (2019), <https://transequality.org/sites/default/files/docs/id/Drivers%20License%20Grades%20Nov%202019.docx.pdf> [<https://perma.cc/9BBG-LXFX>].

<sup>28</sup> Richard Bakker, *X Marks the Spot for the first Intersex Issued passport*, QNEWS (2003), <https://qnews.com.au/x-marks-the-spot-for-the-first-intersex-issued-passport-alex-macfarlane/> [<https://perma.cc/LDU6-4J24>].

<sup>29</sup> See Sunil Babu Pant, et. al. v. Nepal Government, Office of the Prime Minister and Council of Ministers, Legislature-Parliament, Writ No. 917 of the year 2064 BS (Dec. 21, 2007 AD), available at <https://www.icj.org/wp-content/uploads/2012/07/Sunil-Babu-Pant-and-Others-v.-Nepal-Government-and-Others-Supreme-Court-of-Nepal.pdf> [<https://perma.cc/72CU-M827>] (holding that “people with [a] third type of gender identity other than male and female . . . are also Nepali citizens and . . . they should be allowed to enjoy the rights with their own identity as provided by the national laws, the Constitution and international human rights instruments.”).

<sup>30</sup> *Change your gender on your official ID*, NEW ZEALAND GOVERNMENT, <https://www.govt.nz/browse/passports-citizenship-and-identity/changing-your-gender/change-your-gender-on-your-official-id/> [<https://perma.cc/Q97P-C33S>] (last updated July 15, 2019).

<sup>31</sup> Reiss Smith, *Dutch government makes legal transition for transgender people easier*, PINK NEWS (Apr. 11, 2019), <https://www.pinknews.co.uk/2019/04/11/dutch-transgender-passport-gender-change-neutral/> [<https://perma.cc/DB8S-B8NW>].

<sup>32</sup> Samantha Allen, *The Non-Binary Revolution is Starting in Canada*, THE DAILY BEAST (May 11, 2018), <https://www.thedailybeast.com/the-non-binary-revolution-is-starting-in-canada> [<https://perma.cc/7SLE-YGBB>]; see, e.g., Ministry of Government and Consumer Service, *Gender on Health Cards and Driver’s Licences*, GOVERNMENT OF ONTARIO (June 29, 2016), <https://news.ontario.ca/mgs/en/2016/06/gender-on-health-cards-and-drivers-licences.html> [<https://perma.cc/8UG8-P8K2>]; Walter Strong, *Transgender N.W.T., Residents Can Now Change Birth Certificates to Reflect Gender*, CBC NEWS (July 15, 2017), <http://www.cbc.ca/beta/news/canada/north/nwt-transgender-legislation-changes-1.4206782> [<https://perma.cc/4V5P-MWJZ>]; Jenny Peng, B.C. recognizes gender-neutral “X” sign on government IDs, THE STAR (Nov. 2, 2018), <https://www.thestar.com/vancouver/2018/11/02/bc-recognizes-gender-neutral-x-sign-on-government-ids.html> [<https://perma.cc/RW5X-L4HK>] (reporting that Joshua Ferguson was “thankful” that B.C. residents can now apply for an X marker on their BC ID, “in actual fact, I haven’t been issued my correct ID with my X marker that I applied for 16 months ago.”). See also Michelle Pucci, *Quebec’s New Gender Designation Regulations Come into Effect Oct. 1*, MONTREAL GAZETTE (Sept. 30, 2015), <http://montrealgazette.com/news/quebecs-new-gender-designation-regulations-come-into-effect-oct-1> [<https://perma.cc/W58A-H9B3>] (reporting that one Canadian province enacted new gender designation regulations in 2015). In October 2015, Quebec updated its policy to require only a sworn statement from the applicant and an attestation from someone who has known them for at least one year to change their sex designation on provincial documents. *Id.*

“X” option in August 2017.<sup>33</sup> Members of the khawaja sira<sup>34</sup> community began to be registered by the Pakistani government in 2009 as part of a survey that “aims to integrate them further into society.”<sup>35</sup> Later that year, the chief justice of Pakistan ordered the National Database and Registration Authority to issue national identification cards with a third gender category.<sup>36</sup> In 2018, the Transgender Persons (Protection of Rights) Act was passed by the Pakistani legislature to allow individuals to choose their gender and to have that identity recognized on official documents, including national identity documents, passports, and driver licenses.<sup>37</sup> Similarly, India began recognizing this community with an O designation, for “other,” in 2009<sup>38</sup> and in 2014, the Supreme Court of India upheld the right of individuals of trans experience “to decide their self-identified gender” and directed the national and state governments “to grant legal recognition of their gender identity” as male, female, or a third gender.<sup>39</sup>

### B. Rationale for a Simpler Process

Government identification documents are heteronormative, which is a worldview that promotes cisgender heterosexuality as the normal or preferred sexual orientation, and are binary in that there is generally only a male or female option. It would be more logical, however, for identity documents to reflect how a person looks and how they present themselves on a regular basis. An individual of trans experience may have fully transitioned in outward appearance, without having taken the state-mandated steps to obtain a gender marker change. This results in the individual’s identity document contradicting how they appear in person, which does not well serve anyone’s interest. Instead of conforming to such a heteronormative ideology, identity documents should be accurate; this will prevent fraud, furthering state interests, and be sensitive to all gender identities, which serves individual interests.

Requiring individuals to jump through hoops to find and pay for a physician or mental

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<sup>33</sup> Rebecca Joseph, *Canadian Passports to have ‘X’ gender starting Aug. 31*, GLOBAL NEWS (Aug. 25, 2017), <http://globalnews.ca/news/3694753/canadian-passports-x-gender/> [https://perma.cc/N2U5-WGCD].

<sup>34</sup> Khwaja sira describes the trans and nonbinary community in Pakistan. See Faris A. Khan, *Translucent Citizenship: Khwaja Sira Activism and Alternatives to Dissent in Pakistan*, 20 SOUTH ASIA MULTIDISCIPLINARY ACADEMIC JOURNAL, 1 (2019) (“In recent years, the term “*khwaja sira*” has been appropriated and promoted by non-normatively gendered Pakistanis as a respectable alternative to the general public’s pejorative use of the term “*hijra*.””).

<sup>35</sup> Basim Usmani, *Pakistan to Register ‘Third Sex’ Hijras*, THE GUARDIAN (July 18, 2009), <https://www.theguardian.com/commentisfree/2009/jul/18/pakistan-transgender-hijra-third-sex> [https://perma.cc/3EP3-LGXS].

<sup>36</sup> Rabail Baig, *A first for Pakistan’s third gender*, THE SOUTH ASIA CHANNEL (Mar. 30, 2012), <https://foreignpolicy.com/2012/03/30/a-first-for-pakistans-third-gender/> [https://perma.cc/J3CL-Z38U].

<sup>37</sup> Sasha Ingber, *Pakistan Passes Historic Transgender Rights Bill*, NPR (May 9, 2018), <https://www.npr.org/sections/thetwo-way/2018/05/09/609700652/pakistan-passes-historic-transgender-rights-bill> [https://perma.cc/AD5V-NTEV].

<sup>38</sup> Harmeet Shah Singh, *India’s Third Gender Gets Own Identity in Voter Rolls*, CNN (Nov. 12, 2009), <http://edition.cnn.com/2009/WORLD/asiapcf/11/12/india.gender.voting/> [https://perma.cc/R96J-V96Z].

<sup>39</sup> Mark E. Wojcik, *Male. Female. Other. India Requires Legal Recognition of a Third Gender*, AMERICAN BAR ASSOCIATION (Nov. 8, 2018), [https://web.archive.org/web/20190725233547/https://www.americanbar.org/groups/international\\_law/publications/international\\_law\\_news/2014/fall/male\\_female\\_other\\_india\\_requires\\_legal\\_recognition\\_a\\_third\\_gender.sologout/?logout=1](https://web.archive.org/web/20190725233547/https://www.americanbar.org/groups/international_law/publications/international_law_news/2014/fall/male_female_other_india_requires_legal_recognition_a_third_gender.sologout/?logout=1) [https://perma.cc/QUB8-ZMB6].



health professional to provide them with a letter or complete a form is a procedure unfairly applied only to certain individuals, but not others: no such encumbrance is forced upon cisgender individuals for a large increase or decrease in weight, substantial growth spurt, or drastic change in hair color or length. Many transgender individuals who seek Hormone Replacement Therapy (HRT) will have seen a mental health professional to obtain a letter stating that the individual is committed to the transition process; however, individuals of trans experience are generally likely to triage their transition, with survival needs like housing and health care in direct competition. As discussed in the following section, transgender individuals often avoid medical doctors for fear of discrimination and will thus seek to transition without medical supervision. For these individuals, the difficulty of obtaining a letter or signature from a medical or mental health provider can be an additional traumatic obstacle to face.

While the process for individuals of trans experience and nonbinary individuals has improved meaningfully in Oregon, Washington, D.C., California, and a few other states, many states still require surgery to be completed before a gender marker can be altered. This process is excessively burdensome, particularly because many transgender individuals do not feel that Gender Confirmation Surgery (GCS) is a necessary part of their personal transition.<sup>40</sup> Forcing this expensive and invasive surgery on individuals in order to obtain an accurate identification document is dreadfully insensitive and unreasonable and does not serve any state interest in preventing fraud or furnishing identity documents in a uniform fashion. Even in the states that use the standardized form, the process is cumbersome and costly, as transgender individuals must place themselves under the care of a medical or mental health professional for long enough to obtain a signature.

## I. CONTEXT

### A. Gender Identity

#### 1. Definitions

The term “transgender” covers those whose gender identity, expression, or behavior is different from that which is typically associated with their sex as assigned at birth. The term “transgender” is broad and is acceptable for cisgender individuals—those whose gender matches the one assigned to them at birth—to use. The term is correctly used as an adjective, not a noun; thus “transgender individuals” is appropriate while “transgenders” is viewed as disrespectful. The term “trans” is shorthand for transgender and is sometimes used, with or without an asterisk, as a broader term to include more individuals.<sup>41</sup> The phrase, “individuals of trans experience” is used

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<sup>40</sup> See generally Anna James (AJ) Neuman Wipfler, *Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents*, 39 HARV. J. L. & GENDER 491, 509 (2016) (“Removing the burdensome requirement of specific gender-affirming surgeries for changing the sex designation on a birth certificate will allow trans people to access accurate IDs without undergoing expensive, invasive, and often sterilizing procedures.”); Zack Ford, World Health Organization: *Eliminate Forced Surgery for Transgender People*, THINKPROGRESS (June 2, 2014), <http://thinkprogress.org/lgbt/2014/06/02/3443619/world-health-organization-transgender-surgery> [https://perma.cc/2HQL-CAMN] (“Many transgender people never undergo surgical procedures as part of their transition. This could be because they cannot afford it, because they do not wish to sacrifice their reproductive ability, or because they simply do not feel such measures are required for them to realize their authentic gender identity”).

<sup>41</sup> *Tips for Journalists*, NATIONAL CENTER FOR TRANSGENDER EQUALITY (Jan. 26, 2014),

throughout this article in an attempt to best include those who are contemplating transitioning, are in the process of transitioning, or have completed their personal transition.

Being gender nonbinary or gender nonconforming means not fitting within the common gender binary options of male or female, or not conforming to widely accepted gender stereotypes. Nonbinary individuals may identify as both genders, neither gender, or may be gender fluid. A nonbinary individual's "clothes, hairstyle or length, speech patterns, or hobbies might be considered more 'feminine' or 'masculine' than what is stereotypically associated with their [perceived] gender."<sup>42</sup> For example, the term "tomboy" refers to girls who are gender nonconforming: these girls usually play sports typically reserved for boys, spend more time with boys than girls, and dress in more traditionally masculine clothing.<sup>43</sup> Nonbinary or nonconforming individuals may or may not be transgender. Like being transgender, being nonbinary or nonconforming means different things to different individuals and is best viewed as a spectrum.<sup>44</sup>

Gender is chosen at birth by a child's parents or doctor and is generally determined based on external genitalia. This "initial and constrained choice affords the impression that sexual apparatus is binary, salient, fixed, and unambiguous."<sup>45</sup> Although children born with ambiguous anatomy are sometimes ascribed a (U) on their birth certificate to indicate the sex is yet unknown, many doctors make their best guess or allow the parents to choose.<sup>46</sup> Some scientists assert that, biologically speaking, there are many gradations running from female to male: in a ground-breaking paper, Anne-Fausto Sterling asserted that, "depending on how one calls the shots, one can argue that along that spectrum lie at least five sexes and, perhaps, even more."<sup>47</sup> Regardless, an individual born with ambiguous genitalia will not be afforded the option to choose their own gender; someone else will choose it for them at or shortly after birth. Then, because we live in a heteronormative society, the child's parents will likely raise them from birth "as one or the other sex, not both, none, or several."<sup>48</sup>

There is currently no single standard for defining an individual's legal sex and whenever a court or governing body is pressed to come up with one, "the standard seems to change."<sup>49</sup> Writing in 1999, Julie A. Greenberg, an internationally recognized expert on the legal issues relating to gender, sex, sexual identity, and sexual orientation, noted that "[a]ccording to medical professionals, the typical criteria of sex include:

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<http://www.transequality.org/issues/resources/tips-journalists> [<https://perma.cc/6273-5D2N>].

<sup>42</sup> *Frequently Asked Questions about Transgender People*, NATIONAL CENTER FOR TRANSGENDER EQUALITY (July 9, 2016), <http://www.transequality.org/issues/resources/frequently-asked-questions-about-transgender-people> [<https://perma.cc/4SKB-Q4SG>].

<sup>43</sup> *Id.*

<sup>44</sup> See Mere Abrams (Janet Brito, Med. Reviewer) *What Does It Mean to Identify as Nonbinary?*, HEALTHLINE (Dec. 20, 2019), <https://www.healthline.com/health/transgender/nonbinary>.

<sup>45</sup> Annette R. Appell, *Certifying Identity*, 42 CAP. U. L. REV. 361, 384 (2014).

<sup>46</sup> Elizabeth Reilly, *Radical Tweak-Relocating the Power to Assign Sex*, 12 CARDOZO J.L. & GENDER 297, 299 and n.8. (2005).

<sup>47</sup> Anne Fausto-Sterling, *The Five Sexes: Why Male and Female Are Not Enough*, THE SCIENCES, Mar.–Apr. 1993, 21 (1993).

<sup>48</sup> Appell, *supra* note 45 at 385.

<sup>49</sup> Wipfler, *supra* note 40, at 498; See also Jillian Todd Weiss, *Transgender Identity, Textualism, and the Supreme Court: What Is the "Plain Meaning" of "Sex" in Title VII of the Civil Rights Act of 1964?*, 18 TEMP. POL. & CIV. RTS. L. REV. 573, 597–616. (2009).

1. Genetic or chromosomal sex – XY or XX;
2. Gonadal sex (reproductive sex glands) – testes or ovaries;
3. Internal morphologic sex (determined after three months gestation) – seminal vesicles/prostate or vagina/uterus/fallopian tubes;
4. External morphologic sex (genitalia) – penis/scrotum or clitoris/labia;
5. Hormonal sex – androgens or estrogens;
6. Phenotypic sex (secondary sexual features) – facial and chest hair or breasts;
7. Assigned sex and gender of rearing; and
8. Sexual identity.”<sup>50</sup>

For cisgender individuals, the above factors are all congruent and their sexual or gender identity is not in question. For transgender, nonbinary, or intersex individuals, some of the factors are incongruent or an ambiguity within a factor may exist.<sup>51</sup>

## 2. Statistics

In a 2016 report, the Williams Institute estimated that there were approximately 1.4 million adults who identify as transgender in the United States.<sup>52</sup> This estimate doubles a widely used previous estimate of 700,000 transgender individuals from a report conducted five years earlier.<sup>53</sup> Researchers questioned about the report stated that the new estimate reflects, in part, a growing awareness of trans identity while, at the same time, indicating the limits of self-reporting in obtaining definitive data.<sup>54</sup>

Individuals of trans experience—particularly trans women of color—and nonbinary individuals face discrimination in nearly every aspect of their lives: securing employment and housing, in public accommodations, and by law enforcement.<sup>55</sup> The survey conducted by NCTE

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<sup>50</sup> Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 278 and n.74 (1999) (citing JOHN MONEY, SEX ERRORS OF THE BODY AND RELATED SYNDROMES: A GUIDE TO COUNSELING CHILDREN, ADOLESCENTS, AND THEIR FAMILIES (2d ed. 1994)).

<sup>51</sup> *Id.*

<sup>52</sup> ANDREW R. FLORES, JODY L. HERMAN, GARY J. GATES & TAYLOR N. T. BROWN, THE WILLIAMS INSTITUTE, HOW MANY ADULTS IDENTIFY AS TRANSGENDER IN THE UNITED STATES? (June 2016), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf> [https://perma.cc/H95V-3VMU]; see also Jan Hoffman, *Estimate of U.S. Transgender Population Doubles to 1.4 Million Adults*, N.Y. TIMES (June 30, 2016), <https://www.nytimes.com/2016/07/01/health/transgender-population.html> [https://perma.cc/Q3SP-VNK3] (“A comparable estimate for transgender youth in the United States does not yet exist. As elusive as the adult numbers are to track, figures for adolescents, who are already in a molting process of identity, are harder still. Researchers have not yet concurred on a reliable method to tabulate transgender teenagers, much less younger children, though they are at the center of the debates over school bathroom policies.”).

<sup>53</sup> GARY J. GATES, THE WILLIAMS INSTITUTE, HOW MANY PEOPLE ARE LESBIAN, GAY, BISEXUAL, AND TRANSGENDER? (2011), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf> [https://perma.cc/HG5P-M4U3].

<sup>54</sup> Jan Hoffman, *Estimate of U.S. Transgender Population Doubles to 1.4 Million Adults*, N.Y. TIMES (June 30, 2016), <https://www.nytimes.com/2016/07/01/health/transgender-population.html> [https://perma.cc/Q3SP-VNK3].

<sup>55</sup> See generally THE 2015 SURVEY, *supra* note 3.

(“The 2015 Survey”) revealed “disturbing patterns of mistreatment and discrimination and startling disparities between transgender people in the survey and the U.S. population.”<sup>56</sup> Respondents to The 2015 Survey, which examined the experiences of 27,715 individuals, indicated high levels of mistreatment, harassment and violence in all elements of their lives, including in their own homes: one in ten individuals whose immediate family was aware of their transgender status reported that a family member was violent towards them because they are transgender, and eight percent of individuals were kicked out of their homes because they are transgender.<sup>57</sup>

A shocking 30% of respondents to The 2015 Survey who held a job reported being fired or denied a promotion, or experiencing some other form of mistreatment in the workplace due to their gender identity or gender expression.<sup>58</sup> Some were even assaulted at work. Directly related to these statistics is the unemployment rate of individuals of trans experience: 15% of respondents reported being unemployed, which was three times higher than the unemployment rate in the U.S. population (5%) at the time of the survey.<sup>59</sup> Also connected to these statistics is the rate of individuals of trans experience who do not have a place to live: just less than one-quarter (23%) of respondents to the survey experienced some form of housing discrimination, such as being evicted or denied a lease because of their transgender status.<sup>60</sup> More than one-quarter (26%) of the respondents who experienced homelessness then avoided staying in a shelter because they feared being mistreated due to their transgender status, while those who did stay in a shelter reported high levels of mistreatment: seven out of ten respondents who stayed in a shelter reported some form of mistreatment, including “being harassed, sexually or physically assaulted, or kicked out because of being transgender.”<sup>61</sup>

Respondents to The 2015 Survey also indicated that they were regularly harassed or blocked from using restrooms in their workplace, at school, or in public accommodations.<sup>62</sup> Nearly one in ten (9%) respondents reported that they were denied access to a restroom, and more than half (59%) of respondents avoided using a public restroom in the past year because they were afraid of confrontations or other problems. This resulted in eight percent (8%) of individuals getting a urinary tract infection, kidney infection, or developing some other kidney-related problem in the past year because they avoided restrooms.<sup>63</sup>

Although individuals of trans experience may require serious medical care, they are less likely than cisgender individuals to seek it, either out of fear of being mistreated as a trans individual or because they cannot afford it.<sup>64</sup> They are also more likely to have been involved in the underground economy, which includes doing some form of sex work, drug sales, or other work that is currently criminalized. One in five respondents (20%) reported that they have participated in the underground economy at some point in their lives, including 12% who have done sex work, with

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<sup>56</sup> *Id.* at 4.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 5.

<sup>60</sup> *Id.* at 13.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 16 (“The survey data was collected before transgender people’s restroom use became the subject of increasingly intense and often harmful public scrutiny in the national media and legislatures around the country in 2016.”).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

higher rates among women of color.<sup>65</sup> The respondents who had done income-based sex work were also more likely to have experienced violence: more than three-quarters (77%) have experienced intimate partner violence; 72% have been sexually assaulted; of those who were working in the underground economy at the time they took the survey, nearly half (41%) had been physically attacked in the past year and more than one-third (36%) had been sexually assaulted.<sup>66</sup>

Ever the most horrifying statistic to emerge from studies of individuals of trans experience is the suicide rate: 40% of respondents to The 2015 Survey have attempted suicide in their lifetime, which is nearly ten times the attempted suicide rate of the total U.S. population (4.6%).<sup>67</sup> The 2015 Survey spotlights “the challenges that transgender people must overcome and the complex systems that they are often forced to navigate in multiple areas of their lives in order to survive and thrive.”<sup>68</sup> The editors of The 2015 Survey urged governmental and private institutions to address these disparities to ensure that transgender individuals of trans experience are able to “live fulfilling lives in an inclusive society.”<sup>69</sup> Suggestions include “eliminating barriers to quality, affordable health care; putting an end to discrimination in schools, the workplace, and other areas of public life; and creating systems of support at the municipal, state, and federal levels that meet the needs of transgender people and reduce the hardships they face.”<sup>70</sup> This list implicitly includes at least removing the obstacle of completing surgery to obtain an accurate state identity document and, ideally, removing the hurdle of obtaining a medical or mental health professional’s signature to change a gender marker on a government identity document.

## II. STATE INTERESTS

### *A. The State Interest in Sex and Gender*

The state, not the individual, retains the authority to define personal sex or gender, “regardless of whether that sex [or gender] conforms to the person’s own gender identity.”<sup>71</sup> Thus, while an individual can officially identify as male or female—or, in some states, nonbinary or nonconforming—the state retains the ultimate control over “how and when that sex is legitimately tied to the person.”<sup>72</sup> Perversely, the “plurality of definitions” among various countries and even among the states regarding standards for altering an individual’s official sexual or gender identity “undermines the notion of rigid sexual categories.”<sup>73</sup>

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<sup>65</sup> *Id.* at 14.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 5.

<sup>68</sup> *Id.* at 7.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Appell, *supra* note 45, at 390 (referencing Dan McCrue, *State Decides Hermaphrodite Baby’s Gender with Irreversible Sex-Assignment Surgery*, ALTERNET, <http://www.alternet.org/state-decides-hermaphrodite-babys-gender-irreversible-sex-assignment-surgery> [https://perma.cc/7S5J-BSM2] (“South Carolina’s Department of Social Services ordered doctors to do irreversible, medically unnecessary sex-assignment surgery on a year-old child in state custody, her adoptive parents claim in court.”)).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

As noted in the introduction, the tension between individual and governmental interests is worldwide. In 2014, the United Kingdom considered—but decided against—removing gender from the visible information field of its passports, raising the following concerns: gender forms a part of an individual’s identity, “removing this field from the visual field on passports would be a security risk;” “officials at ports of entry may be unable to identify individuals,” it would inconvenience all passport holders and increase time and cost for border controls across the world; and it would be costly.<sup>74</sup> Recognizing that the current system is not working well for individuals of trans experience, the U.K. decided in 2016 to conduct a cross-government review on “removing unnecessary requests for gender information including in official documents” and determining better ways to collect information about individuals of trans experience.<sup>75</sup> Unfortunately, after announcing the review, there was “inaccurate speculation in the media [over what the review was meant to accomplish]”<sup>76</sup> and a large backlash from trans-exclusionary radical feminist (TERF) groups, causing further issues for individuals of trans experience and nonbinary individuals.<sup>77</sup>

### 1. Case Study: Alaska’s Purported Interests Explored

In *K.L. v. State, Dep’t of Admin.*, the Superior Court of Alaska found that the DMV’s licensing scheme on gender markers did not bear a close and substantial relationship to the furtherance of the state’s proffered interests, which were, according to the Alaska DMV, “having accurate documentation and identification and preventing fraud or falsification of identity documents.”<sup>78</sup> The court accordingly concluded that the absence of any procedure allowing licensees to change the gender marker on their licenses impermissibly interfered with the plaintiff’s right to privacy.<sup>79</sup> The court also agreed with the plaintiff that her concern that the routine disclosure of her state-issued driver license would expose her transgender status at least implicated non-fundamental aspects of the right to privacy and that the Alaska DMV’s want of any procedure for changing the gender marker on an individual’s license “indirectly threatens the disclosure of this sensitive personal information.”<sup>80</sup>

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<sup>74</sup> Wipfler, *supra* note 40, at 505; HER MAJESTY’S PASSPORT OFFICE, GENDER MARKINGS IN PASSPORTS: INTERNAL REVIEW OF EXISTING ARRANGEMENTS AND POSSIBLE FUTURE OPTIONS 6 (2014), [http://data.parliament.uk/DepositedPapers/Files/DEP2014-0152/Gendermarkings\\_\\_290114.pdf](http://data.parliament.uk/DepositedPapers/Files/DEP2014-0152/Gendermarkings__290114.pdf) [<https://perma.cc/G6WR-99RJ>].

<sup>75</sup> Government Equalities Office, Caroline Dinenage MP, & The Rt Hon Nicky Morgan, *Gender Recognition Act Review Announced in Plan for Transgender Equality*, GOV.UK (July 7, 2016), <https://www.gov.uk/government/news/gender-recognition-act-review-announced-in-plan-for-transgender-equality> [<https://perma.cc/A7V7-M4C8>].

<sup>76</sup> Government Equalities Office & The Rt Hon Penny Mordaunt, *Facts about the Gender Recognition Act consultation*, GOV.UK (October 14, 2018), <https://www.gov.uk/government/news/facts-about-the-gender-recognition-act-consultation> [<https://perma.cc/6W9E-9XP6>].

<sup>77</sup> Paisley Gilmour, “Your no BS guide to the Gender Recognition Act reforms,” COSMOPOLITAN (Oct. 31, 2019), <https://www.cosmopolitan.com/uk/reports/a29590439/gender-recognition-act/> [<https://perma.cc/Y25H-Q7KV>]. The article notes that there were more than 100,000 responses to the review, but since the consultation closed in October 2018, the government has not published its results.

<sup>78</sup> *K.L.*, 2012 WL 2685183, *supra* note 16, at \*6.

<sup>79</sup> *Id.* at \*8.

<sup>80</sup> *Id.*

In 2009, the plaintiff, K.L., applied for and received an Alaska driver license with the sex designation of male.<sup>81</sup> Shortly thereafter in May 2010, K.L. completed an application for a renewed Alaska driver license, for which she submitted a Certificate of Name Change to change her name and on which she indicated her sex as female.<sup>82</sup> At the time, K.L. held a U.S. passport, medical certificate to operate as a pilot, an FAA-issued airman certificate, and a work identification document which all identified her as female.<sup>83</sup> On June 12, 2010 the DMV accepted K.L.'s Certificate of Name Change and issued her a new license with a female gender marker.<sup>84</sup> However, after the DMV realized there was no documentation reflecting gender confirmation surgery, an Order of Cancellation notice was sent to K.L., indicating that she could avoid cancellation by presenting verification from a doctor that surgery was performed.<sup>85</sup>

K.L.'s dispute of the cancellation of her license resulted in an administrative hearing on January 3, 2011, the issues at which were:

- (1) Whether the State of Alaska has the authority to cancel a license;
- (2) Whether the State erred in issuing a license to K.L.;
- (3) Whether the DMV's Standard Operating Procedure (SOP) D-24 is a regulation that was not promulgated in accordance with the Administrative Procedure Act of AS 44.62; and
- (4) Whether the DMV's policy requiring a medical certification of a sex change violates K.L.'s rights to informational privacy, medical decision-making, autonomy, equal protection, and due process as guaranteed by the Alaska Constitution, article 1, §§ 1, 7, and 22.<sup>86</sup>

On January 31, 2011, the Administrative Hearing Officer ("AHO") decided that Alaska Statute 28.15.161 (a)(2) provides the state with the authority to cancel a license if there is an error or defect in the license;<sup>87</sup> that SOP D-24 was a regulation not promulgated in accordance with the Administrative Procedure Act ("APA") of AS 44.62;<sup>88</sup> that therefore the DMV could not rely on SOP D-24 and thus had no authority to change a gender marker on license until a regulation is adopted that complies with the APA;<sup>89</sup> that any licenses issued under SOP D-24 were done so in

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<sup>81</sup> *Id.* at \*1.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* The DMV employee who processed K.L.'s initial application was "apparently new" to the DMV, and it was unknown whether proof of gender confirmation surgery was requested from K.L.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at \*1-2. The AHO cited *Kenai Peninsula Fisherman's Coop. Assn., Inc. v. State*, 628 P.2d 897, 906 (Alaska 1981) for the proposition that "once a procedure is deemed a regulation that has not been adopted according to the Administrative Procedure Act standards, it becomes invalid and there can be no further reliance on the policy until the procedures required by the APA [are] observed." The *K.L.* court noted that, "by the same reasoning which led to that conclusion, it follows that any new policy regarding a change of the sex designation on one's license would also be subject to the procedures required by the APA," meaning the DMV was left with "no procedure by which licensees can change the sex designation on their license, regardless of whether sex reassignment surgery has been completed."

<sup>89</sup> *Id.* at \*2.

error and are thus invalid under *Kenai Peninsula Fisherman's Coop. Assn., Inc. v. State*;<sup>90</sup> and that K.L.'s license was changed without any legal authority and was therefore invalid.<sup>91</sup>

In making its decision, the court considered whether:

(1) the AHO committed reversible error by misinterpreting and misapplying AS 28.15.161 to find that K.L.'s license contained an "error";

(2) the DMV's refusal to permit a transgender person to correct the sex designation on his or her driver's license or, in the alternative, permit a correction only upon proof of surgery: (a) violates fundamental liberty and privacy rights, and/or (b) violates the right of equal protection; and

(3) the appropriate remedy is the promulgation of an administrative regulation, similar to policies in a growing number of states, which does away with proof of surgical treatment, focusing instead on gender identity and expression.<sup>92</sup>

Regarding whether the Alaska DMV correctly concluded that K.L.'s license contained an error sufficient to warrant cancellation, the court found that "because the DMV had no authority to change the sex designation on a driver's license . . . the change from male to female on K.L.'s license constituted an "error in the document issued" and, as such, the AHO correctly determined that K.L.'s license contained an "error" sufficient to warrant cancellation."<sup>93</sup> Discussing the standard of review, the court determined that, because the case presented questions of law where no agency expertise was involved but where constitutional principles about which courts have specialized knowledge and experience were involved, the appropriate standard of review was the "substitution of judgment" test.<sup>94</sup>

The court went on to determine that, because the DMV was left with no procedure for changing a gender marker on an Alaska driver license, it was required to decide whether the absence of any procedure for changing a gender marker on an individual's state-issued driver license impermissibly infringes on the privacy rights of license holders such as K.L.<sup>95</sup> Unlike the federal constitution, Alaska's constitution provides an explicit right to privacy,<sup>96</sup> with right to privacy "protections [being] necessarily more robust and 'broader in scope' than those of the implied federal right to privacy."<sup>97</sup> Article I, Section 22 of the Alaska Constitution provides: "The right of the people to privacy is recognized and shall not be infringed."<sup>98</sup> Thus, the court resolved, the issue was "whether the Alaska Constitution affirmatively *requires* the DMV to have a procedure in place for

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<sup>90</sup> *Id.* at \*2 (citing *Kenai Peninsula Fisherman's Coop. Assn., Inc.*, 628 P.2d 897, 906 (Alaska 1981)).

<sup>91</sup> *Id.* The AHO refrained from making findings on whether there was a violation of K.L.'s right to informational privacy, medical decision-making, autonomy, or equal protection.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at \*3.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* At oral argument on February 6, 2012, the DMV informed the court that it had no intention of adopting any new policy on gender marker changes on licenses.

<sup>96</sup> *State v. Planned Parenthood of Alaska*, 171 P.3d 577, 581 (Alaska 2007) (quoting *Ravin v. State*, 537 P.2d 494, 514–15 (Alaska 1975) (Boochever, J., concurring)).

<sup>97</sup> *K.L.*, 2012 WL 2685183, *supra* note 16, at \*4 (quoting *id.*).

<sup>98</sup> ALASKA CONST. art. I, § 22.



licensees to change the sex designation on their license.”<sup>99</sup>

Because it makes a difference whether “the state burdens or interferes with a *fundamental* aspect of the right to privacy”<sup>100</sup> or whether the “state action interferes with *non-fundamental* aspects of privacy,”<sup>101</sup> the court proceeded to “consider both the nature and extent of the privacy invasion[, as well as] the strength of the state interest in not having a procedure in place allowing licensees to change” the gender markers on their licenses.<sup>102</sup> On the nature and extent of the privacy invasion, the court reviewed previous cases holding that “an individual’s interest in personal autonomy and independence in decision-making,”<sup>103</sup> as well as “an individual’s interest in protecting sensitive personal information from public disclosure,” were protected by the right to privacy.<sup>104</sup> The court determined that “the right of privacy embodied in the Alaska Constitution is implicated by the disclosure of *personal* information about oneself,”<sup>105</sup> noting that “[a] common thread woven into our decisions that privacy protection extends to the communication of ‘private matters,’” or, as the court put it, “‘sensitive personal information,’ or ‘a person’s more intimate concerns . . . the type of personal information which, if disclosed even to a friend, could cause embarrassment or anxiety.’”<sup>106</sup>

Although the court did not have precedent from Alaska on the right to privacy in the context of one’s transgender status, it looked to the Second Circuit’s recognition that “[t]he excruciatingly private and intimate nature of [being transgender], for persons who wish to preserve

<sup>99</sup> *K.L.*, 2012 WL 2685183, *supra* note 16, at \*3.

<sup>100</sup> *Id.* at \*4 (emphasis added). The state must then demonstrate a “compelling governmental interest and the absence of a less restrictive means to advance that interest. *Sampson v. State*, 31 P.3d 88, 91 (Alaska 2001).

<sup>101</sup> *K.L.*, 2012 WL 2685183, *supra* note 16, at \*4 (emphasis added). The state must then demonstrate “a legitimate interest and a close and substantial relationship between its interest and its chosen means of advancing that interest.” *Sampson*, 31 P.3d at 91.

<sup>102</sup> *K.L.*, 2012 WL 2685183, *supra* note 16, at \*4.

<sup>103</sup> *Id.*; *see, e.g.*, *Huffman v. State*, 204 P.3d 339, 346 (Alaska 2009) (“[T]he right to make decisions about medical treatments for oneself or one’s children is a fundamental liberty and privacy right in Alaska.”); *State v. Planned Parenthood of Alaska*, 171 P.3d 577, 582 (Alaska 2007) (requiring minors to get parental consent or judicial authorization to obtain an abortion violates fundamental right to privacy) (emphasis added); *Valley Hosp. Assn., Inc. v. Mat–Su Coalition for Choice*, 948 P.2d 963, 968–69 (Alaska 1997) (“[T]he choice whether or when to bear children [and] the right to an abortion” are encompassed within the Alaska Constitution’s fundamental right to reproductive autonomy); *Breese v. Smith*, 501 P.2d 159, 169 (Alaska 1972) (the right of privacy of school children includes a *fundamental right to control one’s appearance*) (emphasis added).

<sup>104</sup> *K.L.*, 2012 WL 2685183, *supra* note 16, at \*4; *see, e.g.*, *Falcon v. Alaska Public Offices Commission*, 570 P.2d 469, 479–80 (requiring full public disclosure of the identity of a patient seeking certain specialized care reveals sensitive information and infringes on a fundamental privacy interest); *Rollins v. Ulmer*, 15 P.3d 749, 752–53 (Alaska 2001) (stating in dicta that the “general publication” of presence in a medical marijuana registry “could be stigmatizing and invasive of the right to privacy” but upholding a disclosure law that limited disclosure to authorized public officials); *Gunnerud v. State*, 611 P.2d 69, 72 (Alaska 1980) (“[I]t would be an unwarranted infringement of [defendant’s] privacy . . . to grant access to [their] private medical records unless the material was relevant.”); *State, Dep’t of Revenue v. Oliver*, 636 P.2d 1156, 1166 (Alaska 1981) (“[A]n individual’s privacy interest in [their state tax liability] is within the zone of privacy protected by [the Alaska Constitution] . . . [and] personal finances [are] one kind of information within an individual’s expectation of privacy.”)

<sup>105</sup> *Id.* (quoting *Doe v. Alaska Superior Court*, Third Judicial Dist., 721 P.2d 617, 629 (Alaska 1986)).

<sup>106</sup> *Id.* (quoting *Doe*, 721 P.2d at 629) (internal citations omitted).

privacy in the matter, is really beyond debate.”<sup>107</sup> That court likened being an individual of trans experience to being HIV positive, stating that “[being transgender] is the unusual condition that is likely to provoke both an intense desire to preserve one’s medical confidentiality, as well as hostility and intolerance from others,<sup>108</sup> and that, “[t]herefore, individuals [of trans experience] are among those who possess a constitutional right to maintain medical confidentiality.”<sup>109</sup> The plaintiff’s argument was similar: holding a driver license inconsistent with a person’s expressed gender identity forces the disclosure of their transgender status, which can lead to the disclosure of medical information, severe embarrassment and anxiety, and potentially a risk of harm, harassment, or discrimination.<sup>110</sup>

The court sympathized with K.L., stating that one’s transgender status is “private, sensitive personal information.”<sup>111</sup> Although the court believed the DMV’s lack of procedure did not *directly* threaten the disclosure of this personal information, it nevertheless found that such a threat was *indirectly* imposed.<sup>112</sup> Because individuals must frequently provide a driver’s license as proof of identity or age to government officials and other third parties,<sup>113</sup> when a person of trans experience, like the plaintiff, furnishes a state-issued identity document bearing a male gender marker, “the discrepancy between the license and their physical appearance can lead to the forced disclosure of the person’s transgender[] status.”<sup>114</sup> The court noted that, although the Alaska DMV was neither the entity disclosing this personal information nor even the entity requiring disclosure of such information, “the threat of disclosure [wa]s nonetheless real,”<sup>115</sup> similar to a situation in which an individual’s visit to a particular physician “may have the effect of making public certain confidential or sensitive information.”<sup>116</sup> The court accordingly found that the plaintiff’s privacy expectation in this regard was entitled to protection.<sup>117</sup>

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<sup>107</sup> *Id.* at \*5 (quoting *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999) (holding that the U.S. Constitution protects the right to maintain the confidentiality of one’s transgender status, that such a right exists in prison, and that the right is subject to waiver)).

<sup>108</sup> *Id.* (citing *Powell*, 175 F.3d at 111).

<sup>109</sup> *Id.* (citing *Powell*, 175 F.3d at 112).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at \*6.

<sup>112</sup> *Id.* The court noted that an individual is generally not required to have a driver’s license under Alaska law, except to operate a motor vehicle in the state. *Id.* (citing ALASKA STAT. ANN. § 28.15.011(b) (2019)).

<sup>113</sup> *See, e.g.*, ALASKA STAT. ANN. § 28.15.131(a) (2019) (“A licensee . . . shall present the [driver’s] license for inspection upon the demand of a peace officer or other authorized representative of the Department of Public Safety . . . .”); ALASKA STAT. ANN. § 04.21.050(b) (“[A] valid driver’s license or a valid identification card is acceptable as proof of age or that the person is not restricted from purchasing alcoholic beverages. . . .”).

<sup>114</sup> *K.L.*, 2012 WL 2685183, *supra* note 16, at \*10.

<sup>115</sup> *Id.* at \*10.

<sup>116</sup> *Id.* (quoting *Falcon v. Alaska Pub. Offices Comm’n*, 570 P.2d 469, 479–80 (Alaska 1977) (asserting that “where a physician engages in a specialized area of practice (such as treating sexual problems or venereal disease), the disclosure of a patient’s identity can also reveal the nature of the treatment”).

<sup>117</sup> *Id.* (The court did not find it necessary to determine whether this privacy expectation implicated fundamental aspects of the right to privacy and was not willing to suggest that K.L. has a fundamental right to have the gender marker changed on her driver license. The court’s finding that K.L.’s expectation that the routine disclosure of her driver license would expose her transgender status to the public at least implicated non-fundamental aspects of the privacy right and was sufficient to require the State to show that not allowing anyone to change the gender marker on their driver

The court was not particularly receptive to the DMV's licensing scheme and position on the state's interests. In response to the DMV's argument that "the ability to change weight, height, hair color, and eye color, but not gender, bears a fair and substantial relation to the clear legislative goal of having driver's licenses that do not contain errors, misinformation, or inaccuracies that can be used to perpetuate identification theft, fraud, or other malfeasance," the court found that the DMV's licensing scheme on gender markers "does not bear a close and substantial relationship to the furtherance of these interests."<sup>118</sup> Although the court agreed that the DMV's policy on weight, height, hair color, and eye color was reasonable as it concerned *publicly visible physical features*, the court found that the DMV's policy based on "the appearance of one's physical features *concealed from public view* can undermine the accuracy of identification of individuals based on driver's licenses" because an individual's gender marker reflects physical features which are "not apparently discernable to the public."<sup>119</sup> Accordingly, the court found that blocking individuals of trans experience from changing their gender markers causes their state-issued identity documents to "inaccurately describe the discernable appearance of the license holder by not reflecting the holder's lived gender expression of identity," meaning that when individuals of trans experience furnish their identity documents to third-parties, "the third-person is likely to conclude that the furnisher is not the person described on the license."<sup>120</sup>

The court agreed with the plaintiff's argument that the absence of a procedure for changing a gender marker in Alaska "can create discrepancies and inaccuracies between Alaska driver licenses [and] other forms of government-issued identification." In fact, K.L. was able to obtain a United States passport with a female gender marker by providing a physician's medical certification declaring that she had undergone appropriate clinical treatment for gender transition.<sup>121</sup> The court shrewdly noted that the Alaska DMV's current scheme could even create discrepancies among Alaska identity-document holders:

For example, if an individual such as K.L. – who holds both a United States passport and a secondary form of identification with a female sex designation (e.g., a pilot's license) – were to apply for an Alaska driver's license for the first time, it is possible that the DMV would issue her a license describing her sex as female. On the other hand, where such a person has already obtained an Alaska license, any subsequent license is required to have the original sex designation. Therefore, some transgender[] licensees may hold an Alaska driver's license reflecting their lived gender identity, while others may not.<sup>122</sup>

The court concluded that the DMV's absence of any procedure for changing gender markers on Alaska-issued identity documents did not, therefore, "bear a close and substantial relationship to the furtherance of the state's interests in accurate documentation and identification"

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license bore a close and substantial relationship to the furtherance of a legitimate state interest.).

<sup>118</sup> *Id.*, at \*11.

<sup>119</sup> *Id.* at \*11 (emphasis added).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at \*11; Appellant's Supp. R. at 5–7.

<sup>122</sup> *Id.* at \*12.

and could “actually result in inaccurate and inconsistent identification documents.”<sup>123</sup> This absence of any regulation allowing licensees to change the gender marker on their state-issued driver licenses, according to the court, “impermissibly infringes on a constitutionally protected zone of privacy.”<sup>124</sup>

Lastly, the court considered Alaska’s interest in preventing fraud or the falsification of identity documents, noting that it is “conceivable that such fraud could be accomplished.”<sup>125</sup> Although the DMV conceded that it had seen no evidence of fraud resulting from the gender marker on anyone’s license, the court still found that “some regulation concerning the procedure for changing the sex designation on a license is necessary.”<sup>126</sup> It was sure to note, however, that the Alaska DMV’s “outright refusal to allow anyone to change the sex designation on their license does not bear a close and substantial relationship to the prevention of such fraud.”<sup>127</sup>

Ultimately, this decision hinged on the court’s recognition that furnishing an identity document that does not accurately reflect a person’s visible physical features could result in harm, that the Alaska DMV’s licensing scheme—or lack thereof—allowed for discrepancies between current and new licensees (as well as holders of both federal and state identity documents), and the fact that Alaska Constitution’s explicitly guarantees privacy. The court’s conclusion that even the indirect threat of disclosure of sensitive personal information was a sufficient invasion of privacy that was not offset by the state’s interest in ensuring accurate documents and preventing fraud demonstrates the elsewhere-recognized need for licensing schemes that accurately reflect license holders’ lived gender identities and expressions.

### *B. State Issued Identity Documents and Driver Licenses*

#### *1. A Brief History of Identity Documents*

Documentation of identity in the form of a passport is referenced in literature dating at least as far back as the Old Testament: Nehemiah bore a letter from the King of Persia, addressed to governors of the province beyond the river, asking them to afford the bearer safe passage.<sup>128</sup> In more modern times, a reference to a document providing “safe conduct” can be found during the reign of Henry V of England in an Act of Parliament dated 1414.<sup>129</sup> During Henry V’s reign, the king could issue a document providing safe conduct to anyone regardless of their nationality.<sup>130</sup> In the early 1800s, Napoleon instituted identity documents for workers.<sup>131</sup> Then, in 1844, Sultan

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at \*3–4.

<sup>125</sup> *Id.* at \*12.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Nehemiah* 2:1–8.

<sup>129</sup> Leo Benedictus, *A Brief History of the Passport: From a Royal Letter to a Microchip*, THE GUARDIAN (Nov. 17, 2006), <https://www.theguardian.com/travel/2006/nov/17/travelnews> [<https://perma.cc/4YJ6-FUHP>].

<sup>130</sup> *Id.*

<sup>131</sup> Connor T. Jerzak, *A Brief History of National ID Cards*, HARVARD FXB (Oct. 1, 2017), <https://fxb.harvard.edu/a-brief-history-of-national-id-cards/> [<https://perma.cc/LQ92-DLBL>].

Mahmud II followed suit, bringing “national ID cards to the Ottoman empire.”<sup>132</sup>

Following World War I, the concept of a worldwide passport standard was promoted by the League of Nations, a body charged with maintaining peace.<sup>133</sup> In 1921, the U.S. passed the Emergency Quota Act of 1921 and, three years later, the Immigration Act of 1924, which limited the inflow of immigrants. However, it was not until World War II that more countries instituted national identity documents: in 1938, the U.K. passed the National Registry Act, mandating that all residents hold identity cards.<sup>134</sup> Germany, France, Greece, and Poland followed suit, with identity card adoption expanding throughout Asia in the 1940s and beyond.<sup>135</sup>

Besides the U.S. passport, a true national identity card has never been used in the United States. Instead, states issue their own identity cards or driver licenses, which, in practice, serve as a national identity card. According to the National Museum of American History, “In 1901, New York became the first state to register automobiles and by 1918 all states required license plates.”<sup>136</sup> However, states were slow to issue licenses for drivers. By 1935, there were 39 states issuing driver licenses, but few required a test. Still, most early city and state driver licenses included a sex designator or indicated gender with a name prefix.

## 2. Modern Purposes and Common Uses of Identity Documents

Modern reasons for obtaining and carrying identity documents include proving one’s identity to police or the Transportation Security Administration (TSA), proving age for purchasing items restricted by such a limitation, enrolling in school classes, or obtaining work. Identity documents are also used regularly by Americans to obtain housing, public benefits, and for other government-regulated matters. Gender markers play a large role in these processes, especially for gender-specific housing or benefits. Consider the 29% of respondents to the 2011 National Center for Transgender Equality Survey (“The 2011 Survey”) who were turned away from homeless shelters, the 42% of individuals who stated that they were made to stay in facilities for the wrong gender, or the 25% who were physically assaulted and 22% who were sexually assaulted.<sup>137</sup> More recently, a survey conducted in 2015 by the Center for American Progress and the Equal Rights Center found that only 30 of 100 shelters in four states said they were willing to house transgender women with cisgender women.<sup>138</sup> Similarly, 70% of respondents to The National Center for Transgender Equality’s 2015 Survey who stayed in a shelter in the previous year reported some

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<sup>132</sup> *Id.*

<sup>133</sup> Giulia Pines, *The Contentious History of the Passport*, NATIONAL GEOGRAPHIC: TRAVEL (May 16, 2017), <http://www.nationalgeographic.com/travel/features/a-history-of-the-passport/>. [https://perma.cc/NC3B-XRG2].

<sup>134</sup> Jerzak, *supra* note 131.

<sup>135</sup> *Id.*

<sup>136</sup> *Americans Adopt the Auto*, NAT’L MUSEUM OF AMERICAN HISTORY: AMERICA ON THE MOVE, [http://amhistory.si.edu/onthemove/exhibition/exhibition\\_8\\_2.html](http://amhistory.si.edu/onthemove/exhibition/exhibition_8_2.html) [https://perma.cc/K8DU-2PW9].

<sup>137</sup> JAIME M. GRANT ET AL., NAT’L CENTER FOR TRANSGENDER EQUALITY AND NAT’L GAY AND LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NAT’L TRANSGENDER DISCRIMINATION SURVEY 106 (2011), [https://www.transequality.org/sites/default/files/docs/resources/NTDS\\_Report.pdf](https://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf) [https://perma.cc/CW5T-MPV8].

<sup>138</sup> Caitlin Rooney et al., *Discrimination Against Transgender Women Seeking Access to Homeless Shelters*, CENTER FOR AMERICAN PROGRESS AND THE EQUAL RIGHTS CENTER (Jan. 7, 2016), <https://www.americanprogress.org/issues/lgbt/reports/2016/01/07/128323/discrimination-against-transgender-women-seeking-access-to-homeless-shelters/> [https://perma.cc/T43A-JAT5].

form of mistreatment, including being sexually or physically assaulted, harassed, or even kicked out of the shelter.<sup>139</sup>

In 2016, the Department of Housing and Urban Development (HUD) instituted a new rule, clarifying the 2012 HUD rule, which prohibited anti-LGBT discrimination in all HUD-funded programs. The 2016 rule requires that shelters that segregate housing or programs by gender must respect each individual's "self-identified gender" and cannot force a person into a shelter inconsistent with their gender identity.<sup>140</sup> However, in May 2019, HUD proposed a new rule, providing that grant recipients, subrecipients, owners, operators, managers, and providers under HUD programs that permit single-sex or sex-segregated facilities "may establish a policy, consistent with state and local law, by which such Shelter Provider considers an individual's sex for the purposes of determining accommodation within such shelters and for purposes of determining sex for admission to any facility or portion thereof."<sup>141</sup> The proposed rule permits a shelter provider to consider, among other factors, their own religious beliefs, the individual's sex as reflected on their official government documents, and the gender with which a person identifies.<sup>142</sup> Although HUD asserts that the proposed rule "continues HUD's policy of ensuring that its programs are open to all eligible individuals and families regardless of sexual orientation or gender identity,"<sup>143</sup> it in fact rolls back protections for individuals of trans experience by allowing shelters and shelter employees to turn people away just for holding a gender incongruent identity document. In July 2020, HUD continued its work on the proposed rule, allowing single-sex shelters operating on "good faith belief" that an individual's gender identity does not match their sex assigned at birth to request "documentary evidence of the person's sex" and turn them away.<sup>144</sup>

### 3. Recent Trends

Recent changes in federal and state policies indicate that "governments are acknowledging

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<sup>139</sup> THE 2015 SURVEY, *supra* note 2, at 13.

<sup>140</sup> Harper Jean Tobin, *HUD Finalizes Rule to Ensure Shelters Protect Homeless Trans People*, NATIONAL CENTER FOR TRANSGENDER EQUALITY (Sept. 20, 2016), <http://www.transequality.org/blog/hud-finalizes-rule-to-ensure-shelters-protect-homeless-trans-people> [<https://perma.cc/XJ5Z-ZBBS>].

<sup>141</sup> Department of Housing and Urban Development (HUD), Revised Requirements Under Community Planning and Development Housing Programs (FR-6152) (Sept. 2019), <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=2506-AC53> [<https://perma.cc/UR35-7LGM>].

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> Department of Housing and Urban Development (HUD), Making Admission or Placement Determinations Based on Sex in facilities Under Community Planning and Development Housing Programs (FR-6152-P-01), at 28 (July 2020) ("If a temporary, emergency shelter has a good faith belief that a person seeking access to the shelter is not of the sex which the shelter accommodates, the shelter may request information or documentary evidence of the person's sex, except that the shelter may not request evidence which is unduly intrusive of privacy."); *see also* Housing and Urban Development Public Affairs, *HUD Updates Equal Access Rule, Returns Decision Making to Local Shelter Providers* (July 1, 2020), [https://www.hud.gov/press/press\\_releases\\_media\\_advisories/HUD\\_No\\_20\\_099](https://www.hud.gov/press/press_releases_media_advisories/HUD_No_20_099) [<https://perma.cc/6PNF-YRN4>] ("The new rule allows shelter providers that lawfully operate as single-sex or sex-segregated facilities to voluntarily establish a policy that will govern admissions determinations for situations when an individual's gender identity does not match their biological sex.").

the need for more sex designation options.”<sup>145</sup> As was noted above and is covered in more detail below, some jurisdictions have allowed for a third gender option and many are removing the requirement for surgery to change a gender marker.

In a landmark step in 2010, the U.S. Department of State updated its policy for changing gender markers on U.S. passports.<sup>146</sup> Previous guidelines required applicants of trans experience to undergo surgery before being able to obtain a passport that matched their gender identity. Under the current guidelines, individuals seeking a gender marker change must submit “medical certification that indicates [the applicant has] had appropriate clinical treatment for transition to male or female, or [is] in the process of transition to male or female.”<sup>147</sup> This 2010 policy change preceded many state policy progressions, leading the way for states to follow suit. Unfortunately, the result is that individuals in certain states hold a U.S. passport with a gender marker that accurately reflects their gender identity, but a state driver license that has an inaccurate gender marker, as was the case for the plaintiff in *K.L. v. State, Dep’t of Admin.*

According to the American Association of Motor Vehicle Administrators (AAMVA), the general trend in recent years among states has been to replace requirements to submit proof of surgical treatment with standards that “focus on the gender in which individuals live in their daily lives, as affirmed by a medical provider, mental health provider, or social worker.”<sup>148</sup> Highlights of the recent trends include an easy-to-understand gender designation change form, removal of the surgery requirement, removal of the requirement for a court order or amended birth certificate, and guidance and sensitivity training for agency personnel on protecting private information relating to gender identity affirmations.<sup>149</sup>

Approximately two-thirds of states now allow an individual to change their gender designation without proof of surgery, a court order, or an amended birth certificate.<sup>150</sup> A recent efficiency modernization, mentioned previously and discussed further in the following section, are simplified forms completed by applicants and their medical or mental health provider in lieu of a

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<sup>145</sup> Wipfler, *supra* note 40, at 506.

<sup>146</sup> The State Department seems to have no plans to offer a gender-neutral option on U.S. passports, stating in a recent lawsuit that no U.S. jurisdiction has a policy for issuing IDs “bearing a sex other than male or female.” Brief for Plaintiff at 11, *Zzyym v. Pompeo* (formerly *Zzyym v. Tillerson & Zzyym v. Kerry*), 341 F. Supp. 3d 1248 (D. Colo. 2017) (No. 1:15-cv-02362-RBJ), [https://www.lambdalegal.org/in-court/legal-docs/co\\_zzyym\\_20171010\\_opening-brief-following-reconsideration](https://www.lambdalegal.org/in-court/legal-docs/co_zzyym_20171010_opening-brief-following-reconsideration) [<https://perma.cc/9DXT-P9WJ>].

<sup>147</sup> *Change of Sex Marker*, U.S. DEP’T OF STATE, <https://travel.state.gov/content/travel/en/passports/need-passport/change-of-sex-marker.html> [<https://perma.cc/N7S5-4753>]. The previous version of the website, as published September 29, 2017, stated that applicants for a gender marker change must submit certification from a physician that they “have had, or are in process of having, appropriate clinical treatment for transition to the updated gender,” with no requirement for surgery. *U.S. Passports and International Travel*, U.S. DEP’T OF STATE, <https://travel.state.gov/content/passports/en/passports/information/gender.html> [<https://perma.cc/U5P9-BFPX>].

<sup>148</sup> GENDER DESIGNATION WORKING GROUP, AMERICAN ASSOCIATION OF MOTOR VEHICLE ADMINISTRATORS, RESOURCE GUIDE ON GENDER DESIGNATION ON DRIVER’S LICENSES AND IDENTIFICATION CARDS 3 (2016), [http://www.aamva.org/GenderDesignationOnDLID\\_Sept2016/](http://www.aamva.org/GenderDesignationOnDLID_Sept2016/) [<https://perma.cc/Q89W-J2BS>].

<sup>149</sup> *Id.* at 4.

<sup>150</sup> *Id.* at 25. This guide may not be entirely accurate, as Montana is listed as a state in which surgery is required, although information directly from the Driver Services Deputy Bureau Chief indicates that to change gender on a Montana driver license or identification card, a person would need only to bring a letter from a doctor stating the person is in the process or has completed the process of changing their gender.

letter from the provider. For example, New York City now requires an individual's medical provider attest that "in keeping with contemporary expert standards regarding gender identity, the applicant's requested correction of sex designation of male or female more accurately reflects the applicant's sex or gender identity."<sup>151</sup> The simple form approach "streamlines the process for both applicants and State Driver License Agency (SDLA) staff, saving time and money, and reduces the jurisdiction's liability in holding customers' private medical information."<sup>152</sup> Additionally, the removal of the "clinical treatment" language found on many of the simplified forms is an important step forward for many trans advocates.<sup>153</sup>

### III. INDIVIDUAL INTERESTS

As stated in the Yogyakarta Principles, each individual's self-defined gender identity is "integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom."<sup>154</sup> Although it is clear why an individual would be concerned with their own gender identity, it is not so easy to conceive of a reason why an individual would have any interest in having the state publish this information on their identity documents. Although some state policies seem to refute the fact, identity documents do not establish gender identity: they simply index and disclose it. Accordingly, as identity documents do not define gender identity, there is no reason why an individual should be forced to undergo medical procedures, including GCS, de-facto sterilization, or hormonal therapy, as a requirement for legal recognition of their true gender identity.<sup>155</sup>

As discussed previously, individuals of trans experience and nonbinary individuals face issues with their gender identities every day: from government benefits and medical care to bathrooms and sex-segregated facilities, individuals of all gender identities are regularly forced to disclose their gender identities. Even their fundamental American right to vote is in jeopardy: "In an age of increasing voter identification requirements, access to accurate identification documents is particularly important so that transgender, gender-nonconforming, and intersex people can exercise their fundamental right to vote."<sup>156</sup> A 2018 estimate by the Williams Institute determined that as many as 78,000 of 137,000 trans voters in eight states with strict voter identification laws could be disenfranchised because they do not have government identity documents that accurately reflect their gender.<sup>157</sup> People of color, students, people with low incomes, and individuals with

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<sup>151</sup> DEPARTMENT OF HEALTH AND MENTAL HYGIENE, BOARD OF HEALTH, NOTICE OF ADOPTION OF AMENDMENTS TO ARTICLE 207 OF THE NEW YORK CITY HEALTH CODE 3 (2014), [http://rules.cityofnewyork.us/sites/default/files/adopted\\_rules\\_pdf/f-dohmh\\_12-12-14\\_b\\_art.\\_207.pdf](http://rules.cityofnewyork.us/sites/default/files/adopted_rules_pdf/f-dohmh_12-12-14_b_art._207.pdf) [<https://perma.cc/65MR-EGEE>].

<sup>152</sup> GENDER DESIGNATION WORKING GROUP, *supra* note 148.

<sup>153</sup> Wipfler, *supra* note 40, at 508.

<sup>154</sup> THE YOGYAKARTA PRINCIPLES, *supra* note 3, at 11.

<sup>155</sup> *Id.*

<sup>156</sup> Hayley Gorenberg, Lambda Legal, Comment on Proposed Rule Addressing Physical Description, including Sex, on Driver License, Driver Permit or Identification Card 9 (2017), [https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/lambda\\_legal\\_comments\\_regarding\\_oar\\_735-062-0013\\_submitted\\_5\\_12\\_17.pdf](https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/lambda_legal_comments_regarding_oar_735-062-0013_submitted_5_12_17.pdf) [<https://perma.cc/L586-H6NL>] [hereinafter Lambda Legal Comment].

<sup>157</sup> JODY L. HERMAN & TAYLOR N.T. BROWN, THE WILLIAMS INSTITUTE, THE POTENTIAL IMPACT OF VOTER IDENTIFICATION LAWS ON TRANSGENDER VOTERS IN THE 2018 GENERAL ELECTION (Aug. 2018), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Voter-ID-Laws-2018.pdf> [<https://perma.cc/485V-KUBG>]; *see also* JODY L. HERMAN, THE WILLIAMS INSTITUTE, THE POTENTIAL IMPACT OF VOTER IDENTIFICATION LAWS ON



disabilities are disproportionately affected by these strict laws.

Another example of a common difficulty faced by young individuals of trans experience is college and university dormitory selection. Gender is a mandatory field on some college and university applications and is used to arrange students into sex-segregated housing on campus. Campus Pride estimates that, of thousands of colleges and universities in the U.S., there are only 269 that offer gender-inclusive housing.<sup>158</sup> Montana State University, for example, provides Mixed Gender Housing, which “allows students to live in a suite, regardless of their sex or gender.”<sup>159</sup> This housing community provides programs and resources on “various topics of diversity including race, gender, age, language, socioeconomic status, religion, political affiliation, geographical background, gender identity, sexual orientation, national origin, and ability status.”<sup>160</sup> Similarly, the University of Oregon created its Gender Equity Hall, which is a “community for students who want to live with others who are committed to gender diversity, inclusion, and equity” and is intended for students who “acknowledge, experience, and celebrate the spectrum of gender.”<sup>161</sup> Students in this hall can choose to share rooms with other students “of any gender identity or sex assigned at birth” and share a communal all gender-restroom and shower.<sup>162</sup> These higher education facilities indicate a progression away from strict sex-segregation and toward extensive gender-inclusion.

#### *A. Individuals of Trans Experience and Issues with Identity Documents*

##### 1. Harassment and Safety Concerns

As has been asserted throughout the preceding sections, individuals of trans experience are particularly endangered by the disclosure of their gender, which occurs on a regular basis. Revealing this information when the gender marker on their respective identification documents does not match their gender identity is not only traumatic, it can also be a safety issue: presenting an

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TRANSGENDER VOTERS IN THE 2014 GENERAL ELECTION (Sept. 2014), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/voter-id-laws-september-2014.pdf> [<https://perma.cc/DHY4-TGAS>]; see also JODY L. HERMAN, THE WILLIAMS INSTITUTE, THE POTENTIAL IMPACT OF VOTER IDENTIFICATION LAWS ON TRANSGENDER VOTERS (Apr. 2012), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Herman-Voter-ID-Apr-2012.pdf> [<https://perma.cc/FPF2-ERZ2>].

<sup>158</sup> *Colleges and Universities that Provide Gender-Inclusive Housing*, CAMPUS PRIDE, <https://www.campuspride.org/tpc/gender-inclusive-housing/> [<https://perma.cc/2M4X-4CSB>] (defining gender-inclusive housing as housing in which students can have a roommate of any gender). In 2017 the count was 265, although Montana State University, discussed in this article, was not included. In a 2016 news article, when the count was estimated to be 203, the author of the study acknowledged that the count may underestimate the number of schools that offer gender-inclusive housing. See Scott Malone, *College Dorms a New Front in U.S. Battle over Transgender Rights*, REUTERS (June 10, 2016), <https://www.reuters.com/article/us-usa-lgbt-education/college-dorms-a-new-front-in-u-s-battle-over-transgender-rights-idUSKCN0YW15P> [<https://perma.cc/729Y-GHRE>].

<sup>159</sup> *Living Options*, MONTANA STATE UNIVERSITY (Nov. 26, 2019), [https://www.montana.edu/reslife/living\\_options.html](https://www.montana.edu/reslife/living_options.html) [<https://perma.cc/KU2F-UGRE>].

<sup>160</sup> *Id.* Previously, in 2017, the website described its gender-inclusive housing effort as intending to “support a welcoming community for all individuals, which includes embracing the diverse array of sexualities, gender identities, and gender expressions that may be present in the community.”

<sup>161</sup> *Gender Equity Community*, UNIVERSITY OF OREGON (Nov. 26, 2019), <https://housing.uoregon.edu/communities/gender-equity-hall> [<https://perma.cc/2M8A-48FQ>].

<sup>162</sup> *Id.*

inaccurate identity document can cause an individual of trans experience to reveal their transgender status. This is not an abstract issue; inspection of an individual's birth certificate or the documents it generates, such as a driver's license, often leads directly to discrimination and even violence, especially when a situation involves interactions with security officers, employment, or access to sex-segregated facilities.<sup>163</sup>

Individuals of trans experience are also disproportionately targeted for hate crimes in the United States and abroad and "are put further at risk when their identification documents disclose their transgender status against their will."<sup>164</sup> Everyday interactions can become dangerous situations: "Not having appropriate identification creates difficulties and dangers when dealing with employers or the police and other state agents, trying to travel, attempting to cash checks, or entering age-restricted venues."<sup>165</sup>

Nearly one-third of individuals of trans experience who responded to The 2015 Survey reported being denied equal treatment or service, being verbally harassed, or being physically attacked at places of public accommodation: public transportation, domestic violence shelters, government benefit offices, courts, social security offices, and DMVs.<sup>166</sup> Of those respondents who visited a place of public accommodation where employees thought or knew they were trans and experienced at least one type of mistreatment, 14% reported being denied equal treatment or service, 24% were verbally harassed, and 2% were *physically attacked* because of their transgender status.<sup>167</sup>

The 2015 Survey also reveals that individuals of trans experience—especially trans women of color<sup>168</sup>—are subject to high levels of mistreatment and harassment by police. Of those respondents who interacted with police or law enforcement officers who thought or knew they were transgender, more than half (58%) reported experiencing some form of mistreatment, including "being verbally harassed, repeatedly referred to as the wrong gender, physically assaulted, or sexually assaulted, including being forced by officers to engage in sexual activity to avoid arrest."<sup>169</sup> Nearly three-quarters (71%) of nonbinary respondents to The 2015 Survey, 62% of transgender men, and 51% of transgender women who had encounters with law enforcement reported "having never or only sometimes been treated with respect."<sup>170</sup>

Travel is another risky experience for individuals of trans experience and nonbinary individuals: almost half (43%) of all respondents to The 2015 Survey who had gone through airport security in the previous year "experienced at least one issue related to their gender identity or expression, such as TSA officers using the wrong pronoun or title to refer to them, searching their

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<sup>163</sup> See generally THE 2015 SURVEY, *supra* note 2; see also Lisa Mottet, *Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People*, 19 Mich. J. Gender & L. 373, 392 (2013).

<sup>164</sup> Lambda Legal Comment, *supra* note 156, at 6.

<sup>165</sup> DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW* 12 (2015).

<sup>166</sup> THE 2015 SURVEY, *supra* note 2, at 14.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* ("In the past year, of those who interacted with law enforcement officers who thought or knew they were transgender, one-third (33%) of Black transgender women and 30% of multiracial women said that an officer assumed they were sex workers.")

<sup>169</sup> *Id.* at 14.

<sup>170</sup> *Id.* at 186.

bodies or belongings because of a gender-related item, or detaining them.”<sup>171</sup> About half (51%) of respondents who hold no identity documents reflecting their preferred name and/or lived gender were also more likely to report “negative experiences in airport security related to their gender identity.”<sup>172</sup> The above statistics clearly demonstrate that inaccurate identity documents cause individuals of trans experience and nonbinary individuals to chance and experience danger and harassment.

## 2. Associated Costs

The cost of changing identity documents is unsurprisingly a major obstacle for individuals who are more likely than the general population to be fired from their job or experience homelessness. Data from The 2015 Survey indicates that one direct cause of the harassment individuals of trans experience and nonbinary individuals face is the level of difficulty of changing gender markers on identity documents in many states: according to The 2015 Survey, just less than one-third (32%) of “those who have not updated the gender on their IDs report[ed] that it was because they were unable to afford it.”<sup>173</sup>

As noted in Section II, most states require individuals to slog through a costly process to change their identity document gender markers. To change a gender marker in a state in which a letter from a medical or mental health professional is required or one in which a signature is required on a form, an individual must find such a willing provider and may need to make multiple visits, which are likely not covered by insurance. To change a gender marker in a state in which surgery *is* required, an individual would have to take those same steps, then also pay for a surgery, which many insurance companies do not cover. (To obtain this surgery, most surgeons require a waiting period and multiple visits to a mental health professional and other medical care providers.) Beyond changing their gender markers, many individuals of trans experience also legally change their names. According to The 2015 Survey, more than one-third (35%) of respondents who had not changed their legal name reported that it was because they were unable to afford it.<sup>174</sup>

## 3. Inaccuracy and Inconsistency

The advancements made by some states, jurisdictions, and higher education facilities clash with the fact that 68% of respondents to The 2015 Survey reported that none of their identity documents show the name they prefer and gender with which they identify.<sup>175</sup> This means that an individual could hold a school identity card listing their lived gender and preferred name listed,<sup>176</sup> but still carry—and be required to supply the university with—a driver license with completely different information. This student might even live in a sex-segregated college dormitory that matches their gender identity, but not some of their identity documents. If having an accurate

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<sup>171</sup> *Id.* at 222.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 9.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Colleges and Universities that Allow Students to Change the Name and Gender on Campus Records*, CAMPUS PRIDE, <https://www.campuspride.org/tpc/records/> [https://perma.cc/ULD6-WVEY].

government-furnished identity document is not itself an inherent right, it at least seems reasonable that an individual is entitled to *consistent* identity documents.

Individuals carrying inconsistent identity documents are stuck in a sort of identity document purgatory. Depending on which identity document they are required to produce, they may be perceived as one gender or the other. Worse, if an individual in this situation is required to produce more than one form of identification to a single individual or entity, they may be forced to disclose their transgender status, which can lead to serious complications: “Gender incongruent identification exposes people to a range of negative outcomes, from denial of employment, housing, and public benefits to harassment and physical violence.”<sup>177</sup>

As discussed above, the Alaskan plaintiff in *K.L. v. State Dep’t of Admin.* was stuck in her own identity document purgatory as she held a U.S. passport, medical certificate to operate as a pilot, an airman certificate, and a work identification document which all identified her as female, but a driver license indicating she was male.<sup>178</sup> The court astutely noted that the current DMV scheme could create discrepancies among Alaska driver licenses with respect to current license holders and new license applicants: if an individual like the plaintiff, who held two forms of identification with female sex designations—a U.S. passport and an FAA-provided airman certificate—were to apply for an Alaska driver license *for the first time*, the DMV might issue her a license with a female gender marker. However, if a similarly situated individual already held an Alaska driver license, as was the case for the plaintiff, any subsequent license would be required to display the licensee’s original gender designation, resulting in the individual holding inaccurate and inconsistent identification documents.<sup>179</sup>

In public, gender is determined primarily based on an individual’s gender presentation and the practical reality of how identity documents are used: “Bartenders do not examine customers’ genitals before serving them alcoholic beverages, and police officers do not perform DNA testing before issuing tickets to speeding drivers.”<sup>180</sup> Although critics argue that anatomy or sex as designated at birth is the sole determinant for which restroom an individual may use or, similarly, that the gender designation on identity documents must correspond to the holder’s anatomy and/or chromosomes,<sup>181</sup> this idea ignores how drastically individuals of trans experience can change in their physical appearance. An individual who presents themselves as female but carries a driver license with an “M” will appear to, at best, have been provided an accidentally inaccurate license by the DMV. More likely, the person to whom the driver license is presented—be it a bartender, police officer, or TSA agent, will immediately identify the furnisher as someone of trans experience and accordingly become aware of their private medical history.

Inconsistent gender information on government-furnished identity documents causes

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<sup>177</sup> NATIONAL CENTER FOR TRANSGENDER EQUALITY, A BLUEPRINT FOR EQUALITY: FEDERAL AGENDA FOR TRANSGENDER PEOPLE 32 (2015), [http://www.transequality.org/sites/default/files/docs/resources/NCTE\\_Blueprint\\_2015\\_IDDocumentsPrivacy.pdf](http://www.transequality.org/sites/default/files/docs/resources/NCTE_Blueprint_2015_IDDocumentsPrivacy.pdf) [<https://perma.cc/53WJ-MBXG>].

<sup>178</sup> *K.L.*, 2012 WL 2685183, *supra* note 16, at \*1.

<sup>179</sup> *Id.*

<sup>180</sup> Lambda Legal Comment, *supra* note 156, at 12–13.

<sup>181</sup> See generally Greg Burt, *Bill to Make Gender a Personal Choice*, CALIFORNIA FAMILY COUNCIL (Apr. 3, 2017), <http://www.californiafamily.org/2017/bill-to-make-gender-a-personal-choice-in-hearing-tomorrow/> [<https://perma.cc/3LHD-SKZ6>]; Susan Wright, *California Lawmakers Propose Alternate Gender Reality*, The Resurgent (Jan. 31, 2017), <http://theresurgent.com/california-lawmakers-propose-alternate-reality-gender-classifications-for-official-documents/> [<https://perma.cc/LET7-5WJ8>].

individuals of trans experience and nonbinary individuals to lead unpredictable lives. If an individual of trans experience was born in a state that requires GCS but has not saved the substantial amount of money to afford the surgery, and has therefore not been able to change their birth certificate or driver license, but has had the treatment required to obtain an updated U.S. Passport, they will disclose their transgender status or cause confusion if pulled over by the police, but not when travelling internationally. While a passport may suffice to purchase alcohol or enter a bar, it is usually not adequate to obtain a new apartment or employment. This individual is in their own identity document purgatory: they carry various forms of identification—likely accurate in all ways besides regarding gender—but showing distinctly different gender information. The individual would certainly consider their passport accurate, but their driver license inaccurate. It is unclear whether the state would consider both the driver license and the U.S. Passport accurate, because both have been furnished according to government policy – just by different governing bodies.

Intersex individuals may also find themselves in their own identity document purgatory. Annually, approximately one in every 2,000 babies is born “intersex,” meaning they have characteristics that cannot easily be classified as “male” or “female.”<sup>182</sup> This number may be even higher, as some individuals are born with “subtler forms of sex anatomy variations, some of which won’t show up until later in life.”<sup>183</sup> Dana Zzyym, the plaintiff in Lambda Legal’s case, *Zzyym v. Pompeo* (formerly *Zzyym v. Tillerson* and *Zzyym v. Kerry*), was born intersex, with ambiguous external sex characteristics.<sup>184</sup> The “sex” field on Dana’s birth certificate was initially left blank, but nevertheless Dana was subjected to “several irreversible, invasive, painful, and medically unnecessary surgeries” intended to make Dana’s body conform to binary sex stereotypes.<sup>185</sup> The surgeries failed and neither altered nor even fully disguised Dana’s intersex nature.<sup>186</sup>

Dana identifies as “neither male nor female and, in 2012, successfully amended the gender marker on their birth certificate” to read “Unknown.”<sup>187</sup> In 2014, Dana submitted a U.S. passport application, noting “Intersex” in the sex field and requesting an “X” gender marker, which “conforms to the International Civil Aviation Organization (ICAO) standards for machine-readable travel documents.”<sup>188</sup> The State Department denied Dana’s application.<sup>189</sup> Following a complaint filed by Lambda Legal, in 2016 a U.S. District Court ruled that “the administrative record, as supplemented by the Fellows declaration, does not show that the decisionmaking process that resulted in the policy in question was rational.”<sup>190</sup> In June 2017, Lambda Legal asked a federal court to reopen the case as the U.S. State Department twice refused to recognize an “X” gender marker.<sup>191</sup>

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<sup>182</sup> NATIONAL CENTER FOR TRANSGENDER EQUALITY, FAQs ABOUT TRANSGENDER PEOPLE 2 (2016), [http://www.transequality.org/sites/default/files/docs/resources/Understanding-Trans-Full-July-2016\\_0.pdf](http://www.transequality.org/sites/default/files/docs/resources/Understanding-Trans-Full-July-2016_0.pdf) [<https://perma.cc/R3JS-6FZD>].

<sup>183</sup> *How Common is Intersex?*, INTERSEX SOCIETY OF NORTH AMERICA, <https://isna.org/faq/frequency/> [<https://perma.cc/TU38-HCRD>].

<sup>184</sup> *See generally* *Zzyym v. Tillerson*, No. 1:15-cv-02362-RBJ (D. Colo. June 26, 2017).

<sup>185</sup> Lambda Legal Comment, *supra* note 156, at 4.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 5.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Zzyym v. Tillerson*, No. 1:15-cv-02362-RBJ, at \*12 (D. Colo. June 26, 2017).

<sup>191</sup> Unopposed Mot. to Reopen Case, 2–3, *Zzyym v. Tillerson*, No. 1:15-cv-02362-RBJ (D. Colo. June 26,

The motion was granted and the case reopened as *Zzyym v. Tillerson* (now, *Zzyym v. Pompeo*).<sup>192</sup> Later, a Colorado judge again found that the State Department violated federal law in continuing to deny Dana an accurate passport and denied the State Department's request to stay the order which prohibited the agency from relying upon its binary-only gender marker policy with respect to Dana.<sup>193</sup> In May 2019, Lambda Legal filed a brief at the U.S. Court of Appeals for the Tenth Circuit urging the court to uphold the lower court's ruling,<sup>194</sup> but in May 2020, the Court reversed the ruling, ordering the State Department to "reconsider Dana's passport application anew."<sup>195</sup> Although it reversed the lower court's ruling in favor of Zzyym, the Court did note that forcing "[intersex] individuals to pick a gender [] injects inaccuracy into the data. A chef might label a jar of salt a jar of sugar, but the label does not make the salt any sweeter. Nor does requiring intersex people to mark "male" or "female" on an application make the passport any more accurate."<sup>196</sup>

There is clearly inconsistency among the states, with policies for trans, nonbinary, and intersex individuals varying widely. Individuals of trans experience born and living in states with strict policies are required to obtain GCS before they are able to acquire an updated, state-furnished identity document, while those residing in states with less rigid policies have an easier process, being required to obtain and provide a doctor's letter stating they are in the process of – or have completed the process of – changing their gender. Those individuals of trans experience living in more progressive states have a much easier process, not even needing to see a doctor or mental health professional before obtaining a revised driver license.<sup>197</sup> However, regardless of a trans individuals' place of birth or which state an individual chooses for residence, they may be able to obtain a U.S. passport with an accurate gender marker, meaning their state and federal documents will be incongruent. Further, nonbinary or intersex individuals, like Dana, may be able to obtain an "X" gender marker on a state identity document, but not on their U.S. passport. Consequently, an individual in one state may hold completely congruent identity documents while similarly situated individuals in other states will hold completely contrasting identity documents – this depends solely on the state in which the individuals reside.

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2017).

<sup>192</sup> Ord. Granting Plaintiff's Unopposed Mot. to Reopen Case, 1, *Zzyym v. Tillerson*, No. 15-cv-02362-RBJ (D. Colo. June 27, 2017).

<sup>193</sup> *Zzyym v. Pompeo*, 341 F.Supp.3d 1248, 1256–61 (D. Colo. 2018).

<sup>194</sup> Brief for Appellee at 49, *Zzyym v. Pompeo*, 341 F.Supp.3d 1248, 1256–61 (D. Colo. 2018) (No. 1:15-cv-2362).

<sup>195</sup> *Tenth Circuit Orders State Department to Reconsider Decision to Deny Intersex Vet an Accurate Passport*, LAMBDA LEGAL (May 12, 2020), [https://www.lambdalegal.org/news/co\\_20200512\\_10th-circuit-orders-state-dept-to-reconsider-zzyym](https://www.lambdalegal.org/news/co_20200512_10th-circuit-orders-state-dept-to-reconsider-zzyym) [https://perma.cc/TLM5-JNX9].

<sup>196</sup> *Zzyym v. Pompeo*, 958 F.3d 1014 (May 12, 2020).

<sup>197</sup> If an individual born in a state that requires GCS were to move to a less strict state like Oregon or California, they could easily self-affirm their gender and obtain an accurate driver license that is consistent with their U.S. Passport; however they might not be able to amend their birth certificate if their birth state requires surgery, because the state in which an individual is born retains jurisdiction. They will, thus, always hold a birth certificate that matches none of their other identity documents, unless their state of birth changes its policy. The silver lining is, perhaps that birth certificates are required to be furnished much less often than driver licenses or U.S. Passports.

#### 4. Psychological Impact

More than two-thirds (39%) of respondents to The 2015 Survey reported experiencing “serious psychological distress” in the month prior to completing the survey, compared to only 5% of the U.S. population.<sup>198</sup> As stated previously, individuals of trans experience are also far more likely than the general U.S. population to attempt suicide.<sup>199</sup> Even with recent advancements in health care, protections for individuals of trans experience, and increased visibility, 7% of transgender individuals—nearly twelve times the rate of the general U.S. population (0.6%)—attempted suicide in the year prior to completing The 2015 Survey.<sup>200</sup>

Individuals of trans experience also face substantial challenges within their family and faith communities. Although many find welcoming and supportive communities during their transitions, many individuals of trans experience lose family and friends when they disclose their transgender status.<sup>201</sup> For this reason alone, it seems unreasonable to impose further burdens on an already marginalized, regularly harassed, and vulnerable group of individuals. Beyond that, causing an individual in this oppressed group to present an identity document that displays a gender marker that does not reflect their gender identity actually causes a negative psychological impact.<sup>202</sup> Similarly, a recent California Senate committee report noted that the state’s failure to “recognize nonbinary individuals, who self-identify as neither male nor female . . . causes them emotional distress and violates their right to be free from discrimination on the basis of their gender identity and expression.”<sup>203</sup>

#### B. Constitutional Considerations

##### 1. Privacy

The Supreme Court has long history of recognizing privacy as a fundamental right, noting in 1958 the “vital relationship between freedom to associate and privacy in one’s associations.”<sup>204</sup> In 1965, it elaborated on this idea, stating that “the Bill of Rights have penumbras, formed by emanations from [specific] guarantees that help give them life and substance . . . [and] create zones of privacy” against “governmental intrusions.”<sup>205</sup> Finding that a Connecticut law forbidding the use of contraceptives unconstitutionally infringed the right of marital privacy, the Court declared that such a right is “older than the Bill of Rights.”<sup>206</sup> It has since heard cases on different types of privacy

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<sup>198</sup> THE 2015 SURVEY, *supra* note 2, at 3.

<sup>199</sup> *Id.* at 8 (stating that close to half (40%) of individuals of trans experience have attempted suicide at some point in their lives, compared to 4.6% of the general population).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 70–79.

<sup>202</sup> *Id.* at 85, 89–90.

<sup>203</sup> S. Comm. on Transp. and Hous., SB 179 Analysis, at 3 (Cal. 2017–18).

<sup>204</sup> Nat’l Ass’n for Advancement of Colored People v. State of Ala. ex rel. Patterson, 357 U.S. 449, 462 (1958).

<sup>205</sup> Griswold v. Connecticut, 381 U.S. 479, 483–4 (1965).

<sup>206</sup> *Id.* at 486.

rights, including “avoiding disclosure of personal matters,”<sup>207</sup> which should certainly include an individual’s transgender status.

Between the first, third, fourth, and fifth amendments, Americans are theoretically given privacy from most forms of government intrusion, allowing us to keep private what we wish. In that respect, NCTE Deputy Executive Director Lisa Mottet has suggested, “[i]f a governmental entity does not protect the privacy of a transgender person and reveals his or her status—either through issuing visibly amended birth certificates or by providing access to records that indicate a person is transgender—it may be in violation of the right to privacy guaranteed by the U.S. Constitution.”<sup>208</sup> While the Supreme Court has yet to consider this specific topic, the Second Circuit Court of Appeals has done so, deciding in *Powell v. Schriver*, a case to which the Superior Court of Alaska looked for guidance, that there is a constitutional right to privacy that protects individuals of trans experience from unnecessary government disclosure of their transgender status.<sup>209</sup>

In *Powell v. Schriver* the Second Circuit Court of Appeals considered, *inter alia*, whether an inmate’s constitutional right to privacy was impinged when her transgender status was disclosed.<sup>210</sup> The *Schriver* court concluded that their reasoning in *Doe v. City of New York*<sup>211</sup> compelled the conclusion that “the Constitution does indeed protect the right to maintain the confidentiality of one’s [transgender status].”<sup>212</sup> In *Doe*, the Second Circuit had followed the Supreme Court’s principle from *Whalen v. Roe*: “there exists in the United States Constitution a right to privacy protecting ‘the individual interest in avoiding disclosure of personal matters.’”<sup>213</sup> The Court characterized this right to privacy as a “right to ‘confidentiality’” to distinguish it from the individual right to autonomy and independence in decisionmaking for personal matters.<sup>214</sup> The *Doe* court had also considered that “there are few matters that are quite so personal as the status of one’s health, and few matters the dissemination of which one would prefer to maintain greater control over,” concluding therefore that “the right to confidentiality includes the right to protection regarding information about the state of one’s health.”<sup>215</sup>

The *Schriver* court reasoned that the grounds for keeping one’s transgender status secret would be similar to the reasons to keep one’s HIV status private: the choice to inform others is one an individual would normally make themselves, there is an “unfortunately unfeeling attitude among many in this society” regarding the issue, and that to reveal this private matter would be to expose

<sup>207</sup> *Whalen v. Roe*, 429 U.S. 589, 599 (1976) (referencing the right to be left alone in “personal matters”).

<sup>208</sup> Lisa Mottet, *Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People*, 19 MICH. J. GENDER & L. 373, 444 (2013); *See also Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994) (clarifying that this right to privacy “can be characterized as a right to ‘confidentiality’ to distinguish it from the right to autonomy and independence in decision-making for personal matters recognized in *Whalen*”) (citing *Schachter v. Whalen*, 581 F.2d 35, 36–37 (2d Cir.1978)).

<sup>209</sup> *See Powell v. Schriver*, 175 F.3d 107, 111–112 (2nd. Cir. 1999).

<sup>210</sup> *Id.* at 111.

<sup>211</sup> *See Doe*, 15 F.3d at 267, 269 (holding that the plaintiff possessed a constitutional right to privacy regarding his condition as HIV positive, and that his HIV status did not, as a matter of law, automatically become a public record when he filed his claim with commission and entered into conciliation agreement).

<sup>212</sup> *Powell*, 175 F.3d at 110–12 (citing *Doe*, 15 F.3d at 267).

<sup>213</sup> *Doe*, 15 F.3d at 267 (quoting *Whalen v. Roe*, 429 U.S. 589, 599 (1977)).

<sup>214</sup> *Id.* at 267.

<sup>215</sup> *Id.*



oneself “not to understanding or compassion but to discrimination and intolerance.”<sup>216</sup> Further, the court stated that the “excruciatingly private and intimate nature of [being transgender],<sup>217</sup> for persons who wish to preserve privacy in the matter, is really beyond debate.”<sup>218</sup> The *Schrivier* court thus decided that, with “the question of whether the privacy of certain medical conditions should be constitutionalized [having] been answered by *Doe* in the affirmative,” it must logically hold that “individuals who are [transgender] are among those who possess a constitutional right to maintain medical confidentiality.”<sup>219</sup>

As examined above, when the Superior Court of Alaska heard *K.L. v. State Dep’t of Admin.*, it also considered whether the state government infringed an individual of trans experience’s privacy rights. Particularly because Alaska’s constitution provides an explicit right to privacy, the Court in *K.L. v. State Dep’t of Admin.* considered whether the absence of any procedure for changing the gender marker on an individual’s license impermissibly impinges on the privacy rights of license holders such as the plaintiff.<sup>220</sup> The court rightly decided that an individual’s transgender status is private, sensitive personal information,<sup>221</sup> likewise finding that the DMV’s lack of procedure to change gender markers indirectly threatens the disclosure of such personal information, and that when an individual is required to furnish their driver license, the discrepancy between it and their personal appearance could lead to forced disclosure of the individual’s transgender status.<sup>222</sup>

## 2. Equal Protection

The Fourteenth Amendment to the constitution is another source of protection for individuals of trans experience. This amendment declares that no state shall “make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>223</sup> This amendment requires that states govern their citizens impartially. A governmental body fails to govern impartially when it

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<sup>216</sup> *Powell*, 175 F.3d at 111 (quoting *Doe* 15 F.3d at 267).

<sup>217</sup> The Court uses the term “transsexual,” an older term which originated in medical and psychological communities. See GLAAD Media Reference Guide - Transgender, GLADD, <https://www.glaad.org/reference/transgender> [<https://perma.cc/CC5A-RHTE>]. Unlike the term “trans” or “transgender,” “transsexual” is not an umbrella term, and many individuals of trans experience do not identify as transsexual. *Id.* (“If preferred, use as an adjective: transsexual woman or transsexual man.”).

<sup>218</sup> *Powell*, 175 F.3d at 111.

<sup>219</sup> *Id.* at 112.

<sup>220</sup> *K.L.*, 2012 WL 2685183, *supra* note 16, at \*3-4.

<sup>221</sup> *Id.* at \*6. The Court considered that sensitive personal information is “the type of personal information which, if disclosed even to a friend, could cause embarrassment or anxiety.” *Id.* at \*4 (quoting *Doe v. Alaska Superior Court*, 721 P.2d 617, 629 (Alaska 1986)). Further, the Court examined the language from the Second Circuit, that “[being transgender] is the unusual condition that is likely to provoke both an intense desire to preserve one’s medical confidentiality, as well as hostility and intolerance from others” and that thus “individuals who are [transgender] are among those who possess a constitutional right to maintain medical confidentiality.”

<sup>222</sup> *K.L.*, 2012 WL 2685183, *supra* note 16, at \*6 (quoting *Powell*, 175 F.3d at 110).

<sup>223</sup> *Id.* at \*3-4.

<sup>224</sup> U.S. Const. amend. XIV, § 1.

treats similarly situated individuals differently, denying them equal protection of the laws.

The Supreme Court first considered the notion of similarly situated individuals in 1884 in an equal protection case that was “a precursor to *Yick Wo v. Hopkins*” and involved a San Francisco ordinance that targeted laundries run by Chinese immigrants.<sup>224</sup> Since then, lower courts have considered cases in which a governmental body is accused of treating similarly situated individuals differently and whether this constitutes an equal protection violation. A rather recent example of such consideration occurred in 2010, when the court in *Perry v. Schwarzenegger* determined that same-sex and opposite-sex couples are “situated identically” and that Proposition 8, which restricted valid marriages to those between a man and a woman, violated both the Due Process and Equal Protection Clauses of the Fourteenth Amendment.<sup>225</sup>

One year after the *Perry v. Schwarzenegger* decision, Vandy Beth Glenn, an editor in the General Assembly’s Office of Legislative Counsel in Georgia, felt that she was treated differently than her coworkers who more traditionally conformed to customary gender stereotypes. She thus brought a § 1983 action against her former supervisor and state officials, alleging that she was discriminated against on the basis of her sex and her medical condition, Gender Identity Disorder (GID), in violation of the Fourteenth Amendment.<sup>226</sup> The U.S. District Court for the Northern District of Georgia found in her favor, with Judge Barkett explaining that Glenn’s supervisor did not have a sufficiently important governmental interest to justify terminating her.<sup>227</sup>

Prohibiting an individual of trans experience from receiving an identity document that conforms to their gender identity is a clear example of treating them differently than cisgender individuals and conceivably also constitutes discrimination. According to Judge Barkett, “discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it’s described as being on the basis of sex or gender.”<sup>228</sup> Accordingly, an individual of trans experience in such a situation could argue that they are being denied an accurate identity document because of their non-conformation to traditional gender norms and are thus being discriminated against in violation of the Fourteenth Amendment.

Equal protection issues also arise when the government discriminates against a class of individuals.<sup>229</sup> Under rational basis review, when a law affects groups such as those which are age-

<sup>224</sup> *Barbier v. Connolly*, 113 U.S. 27, 32 (1885) (holding that the regulation of laundries for public health and safety reasons was within the police powers of the state and that the Fourteenth Amendment was not meant to interfere with the power of the State); *see also Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (ruling that a law that is race-neutral on its face, but is administered in a prejudicial manner, is an infringement of the Equal Protection Clause of the Fourteenth Amendment).

<sup>225</sup> *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 993 (N.D. Cal. 2010) (“[r]elative gender composition aside, same-sex couples are situated identically to opposite-sex couples in terms of their ability to perform the rights and obligations of marriage under California law.”).

<sup>226</sup> *Glenn v. Brumby*, 663 F.3d 1312, 1314–17 (11th Cir. 2011) (holding that discriminating against someone on the basis of his or her gender non-conformity constitutes sex-based discrimination under the Equal Protection Clause and explaining sex-stereotyping theory of sex discrimination under Title VII: “[a]ll persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype”).

<sup>227</sup> *See id.* at 1321 (“[Supervisor] Brumby presented insufficient evidence to show that he was actually motivated by concern over litigation regarding Glenn’s restroom use. To support the justification that he now argues, Brumby points to a single statement in his deposition where he referred to a speculative concern about lawsuits arising if Glenn used the women’s restroom.”).

<sup>228</sup> *Id.* at 1317.

<sup>229</sup> ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 685, 812 (4th ed. 2011).

based or criminal record-based, the governmental body accused must prove that its law is rationally related to a legitimate government interest. Laws affecting quasi-suspect classifications, such as gender, are reviewed under intermediate/heightened scrutiny and must be substantially related to a legitimate government interest. Finally, under the least deferential level of review—strict scrutiny—a governmental body must prove that its law affecting a suspect class, such as a race-based class, is necessary to achieve a compelling governmental interest and that the law is narrowly tailored to achieve its intended result.

At this point, it is unclear what level of scrutiny is to be used to review laws that discriminate based on sexual orientation and gender identity. In 2012, the Second Circuit Court of Appeals concluded that heightened scrutiny was required to review Section 3 of the Defense of Marriage Act (DOMA), which dealt with sexual orientation.<sup>230</sup> Chief Judge Jacobs considered the factors used by the Supreme Court to decide whether a classification qualifies as a quasi-suspect class, including whether the class has been historically “subjected to discrimination,”<sup>231</sup> whether the class has a defining characteristic that “frequently bears [a] relation to ability to perform or contribute to society,”<sup>232</sup> whether the class exhibits “obvious, immutable, or distinguishing characteristics that define them as a discrete group,”<sup>233</sup> and whether the class is “a minority or politically powerless.”<sup>234</sup> The court considered that “immutability and lack of political power are not strictly necessary factors to identify a suspect class,”<sup>235</sup> but that “immutability and political power are indicative.”<sup>236</sup> The court felt that all four Supreme Court factors justified heightened scrutiny: “homosexuals as a group have historically endured persecution and discrimination . . . homosexuality has no relation to aptitude or ability to contribute to society . . . homosexuals are a discernible group with non-obvious distinguishing characteristics, especially in the subset of those who enter same-sex marriages . . . and the class remains a politically weakened minority.”<sup>237</sup> When the case reached the Supreme Court, the justices considered whether heightened scrutiny was appropriate, noting that the Department of Justice sent a § 530D letter reflecting the Executive’s own conclusion “that heightened equal protection scrutiny should apply to laws that classify on the basis of sexual orientation.”<sup>238</sup> However, instead of adopting the lower court’s reasoning on the question of scrutiny, the Supreme Court struck down § 3 of DOMA “as a classification not properly

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<sup>230</sup> See generally *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), *aff’d*, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013).

<sup>231</sup> See *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987).

<sup>232</sup> See *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440–41 (1985).

<sup>233</sup> See *Bowen*, 483 U.S. at 602.

<sup>234</sup> *Windsor*, 699 F.3d at 181.

<sup>235</sup> *Id.* at 181 (quoting *Cleburne*, 473 U.S. at 442 n.10, 105 S.Ct. 3249 (“‘[T]here’s not much left of the immutability theory, is there?’”)) (quoting *J. ELY, DEMOCRACY AND DISTRUST* 150 (1980)); *Cleburne*, 473 U.S. at 472 n.24, 105 S.Ct. 3249 (Marshall, J., concurring in part and dissenting in part) (“The ‘political powerlessness’ of a group may be relevant, but that factor is neither necessary, as the gender cases demonstrate, nor sufficient, as the example of minors illustrates.”); *Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977) (rejecting the argument that alienage did not deserve strict scrutiny because it was not immutable); see also *Pedersen v. Office of Personnel Management*, 881 F.Supp.2d 294, 310; *Golinski v. Office of Personnel Management*, 824 F.Supp.2d 968, 983; *Kerrigan v. Comm’r. of Pub. Health*, 289 Conn. 135, 167–68 (Conn. 2008).

<sup>236</sup> *Windsor*, 699 F.3d at 181.

<sup>237</sup> *Id.*, at 181–82.

<sup>238</sup> *United States v. Windsor*, 570 U.S. 744, 754 (2013).

supported by its objectives.”<sup>239</sup>

In 2015, *Obergefell v. Hodges* settled the question of same-sex marriage.<sup>240</sup> However, this was done with “scarcely a word about tiered scrutiny review.” Thus, perhaps until recently, it had become increasingly clear to some legal scholars “that the Court neither sees the need nor feels the inclination to move sexual orientation into the suspect ranks.”<sup>241</sup> On October 8, 2019, the court heard oral arguments in *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*,<sup>242</sup> and will decide this term<sup>243</sup> whether Title VII prohibits discrimination against individuals of trans experience based on their transgender status or sex stereotyping under *Price Waterhouse v. Hopkins*.<sup>244</sup> The question of whether depriving an individual of trans experience the right to keep their transgender status private seems to be question of whether an individuals is deprived of a fundamental right. Strict scrutiny is applied not only when discrimination based on race or national origin occurs, but also when a governmental body burdens a fundamental right.<sup>245</sup> Burdens on fundamental rights, such as the right to privacy, require the government to prove that it has a sufficient purpose to decide who can exercise the right. If individuals of trans experience, like the plaintiff in *R.G. & G.R. Harris Funeral Homes Inc.* are exercising their fundamental right to privacy by keeping private their transgender status, and they are denied this right by the government, they are arguably being denied equal protection of the laws in violation of the Fourteenth Amendment.

#### IV. STATE MODELS

As discussed in the preceding sections, state policies vary widely in ease of changing gender markers. In some states, surgery, a court order, or an amended birth certificate is required before an individual can change their gender marker. In other states, an amended passport is acceptable as proof of gender identity. In many states, a letter from a healthcare provider stating that updating the gender marker is appropriate and consistent with the individual’s gender identity, or a simplified form stating the applicant’s gender identity—either male or female only—and that

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<sup>239</sup> *Id.* at 815.

<sup>240</sup> 135 S. Ct. 2584 (2015).

<sup>241</sup> David Schraub, *The Siren Song of Strict Scrutiny*, 84 UMKC L. REV. 859, 860 (2016).

<sup>242</sup> Respondent Aimee Stephens worked as a funeral director at R.G. and G.R. Harris Funeral Homes when she informed the owner that she was transgender. After being fired, the Equal Employment Opportunity Commission sued on her behalf, and the Sixth Circuit Court of Appeals ruled that her employer engaged in unlawful sex discrimination under Title VII when it fired her. She was represented by the ACLU in her case before the Supreme Court. Aimee Stephens passed away May 12, 2020, one month before her case was decided by the Supreme Court.

<sup>243</sup> Editor’s Note: On June 15, 2020, the Supreme Court issued a decision in *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission* authored by Justice Gorsuch, holding “An employer who fires an individual merely for being gay or transgender violates Title VII of the Civil Rights Act of 1964.” *Bostock v. Clayton Cnty.*, 140 S.Ct. 1731 (2020).

<sup>244</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 228 (1989) (holding that that Title VII’s reference to “sex” protected a woman who failed to conform to social expectations concerning how a woman should look and behave in the workplace).

<sup>245</sup> Shohreh Davoodi, *More Than A Piece of Paper: Same-Sex Parents and Their Adopted Children Are Entitled to Equal Protection in the Realm of Birth Certificates*, 90 CHI.-KENT L. REV. 703, 714 (2015).

it can “reasonably be expected to continue as such for the foreseeable future”<sup>246</sup> is sufficient. Finally, in limited jurisdictions, self-affirmation of gender is sufficient for a gender marker change. The following states—Alabama, Montana, and Oregon—were chosen for their wide-ranging policies on changing gender markers on state-furnished identity documents. The states’ societal histories also run the gamut from conservative to progressive.

Alabama, the “Heart of Dixie,” once held among the largest numbers of enslaved individuals. It was one of the first U.S. states to secede and join the Confederacy, with the Confederacy’s capitol located in Montgomery. Alabama has a long history of oppression: the indigenous tribes of the Cherokees, Choctaws, Creeks, Chickasaws, Alabama-Coushattas and the Yuchis were forcibly removed in the 1830s to make room for cotton plantations and white settlement.<sup>247</sup> After the Civil War, the state’s constitution was rewritten to disenfranchise people of color and those living in poverty, with 181,315 eligible black voters in 1900 shrinking to only 2,980 registered black voters in 1903.<sup>248</sup> The Selma to Montgomery marches held in 1965 resulted in the beating and tear-gassing of peaceful protesters on the Edmund Pettus Bridge,<sup>249</sup> ultimately leading to President Johnson’s signing of the Civil Rights Act and statement that Selma was “a turning point in man’s unending search for freedom.”<sup>250</sup> After *Obergefell v. Hodges*, some conservative Alabama probate judges stopped issuing marriage licenses, leading to state lawmakers recently passing a workaround bill to allow marriage certificates that don’t have to be signed before the wedding by a judge.<sup>251</sup> In 2019, the Alabama legislature passed a near-total ban on abortion, which, with the Republican governor’s signature, was set to take effect on November 15; however, a federal judge temporarily blocked the ban.<sup>252</sup>

Montana is a more libertarian state that prides itself on hunting—but also access to abortion and same-sex marriage. Although the state went for Trump in 2016, Montana also reelected its democratic governor for a second term. Montana is home to seven federally recognized tribes, each having their own reservation, with the Little Shell Tribe of Chippewa Indians recently being added

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<sup>246</sup> See, e.g., New Mexico Gender Designation Change Request in app.

<sup>247</sup> *Native Americans in Alabama*, ENCYCLOPEDIA OF ALABAMA, <http://www.encyclopediaofalabama.org/article/s-142> [<https://perma.cc/BS8D-LYYR>].

<sup>248</sup> GLENN FELDMAN, *THE DISENFRANCHISEMENT MYTH: POOR WHITES AND SUFFRAGE RESTRICTION IN ALABAMA* 136 (2004).

<sup>249</sup> As of July 2020, nearly 400,000 people had signed a petition to rename the bridge after Representative John Lewis, a civil rights icon who took part – and was injured – in the marches. Doha Madani, *Petition to rename Edmund Pettus Bridge after Rep. John Lewis endorsed by Ava DuVernay*, NBC NEWS (June 15, 2020), <https://www.nbcnews.com/news/us-news/petition-rename-edmund-pettus-bridge-after-rep-john-lewis-endorsed-n1231112> (“The bridge is named after Alabama native Edmund Pettus, a Confederate general in the Civil War whose family profited from slavery, according to Smithsonian Magazine. After the war, Pettus settled in Selma, where he became a U.S. senator and a Grand Dragon in the KKK.”).

<sup>250</sup> Lyndon B. Johnson, *Special Message to the Congress: The American Promise*, THE AMERICAN PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/special-message-the-congress-the-american-promise> [<https://perma.cc/RR86-XB2H>].

<sup>251</sup> *Alabama Lawmakers Pass Workaround Bill on Same-sex Marriage*, ASSOCIATED PRESS, (May 24, 2019), <https://www.nbcnews.com/feature/nbc-out/alabama-lawmakers-pass-workaround-bill-same-sex-marriage-n1010076> [<https://perma.cc/A5MV-5ZU5>].

<sup>252</sup> Rick Rojas & Alan Blinder, *Alabama Abortion Ban Is Temporarily Blocked by a Federal Judge*, N.Y. TIMES (Oct. 29, 2019), <https://www.nytimes.com/2019/10/29/us/alabama-abortion-ban.html> [<https://perma.cc/6YGK-5YD4>].

to the list of federally recognized tribes after a long campaign by the tribe and Montana's congressional delegation.<sup>253</sup> The first white inhabitants in Montana were miners and cattle ranchers; however, over the last 80 years the natural resources extraction industries have "suffered wild market fluctuations and unstable employment patterns" which allowed agriculture to emerge and remain Montana's primary industry.<sup>254</sup> Although it is the fourth largest state in the U.S., Montana boasts a small population of only about one million people, with many sparsely populated rural areas in the eastern half of the state. There have been recent successful attempts among white Montanans to "build bridges" with indigenous people and accept immigrants, although the recent emergence of white-supremacist cells<sup>255</sup> and the 2019 detainment of two women speaking Spanish near the Canadian border are obvious setbacks.<sup>256</sup>

Further west, Oregon is one of the most progressive U.S. states. Known as the end of the Oregon trail, where Meriwether Lewis and William Clark traveled to the Pacific Ocean, Oregon has a profound history of white conflict with indigenous people. As gold miners arrived in droves, tribes like the Nez Perce were forced to move into continually smaller areas of land. Now known as a liberal state, Oregon was once a hotbed of racism, entering the Union in 1859 as the only "no-blacks state" with the Peter Burnett Lash Law, which theoretically allowed black people to be publicly whipped every six months until they left the state.<sup>257</sup> In the 1920s, Oregon was the seat of the largest Ku Klux Klan west of the Mississippi and in 2017 three men were stabbed—two of them killed—by a white supremacist when they came to the defense of two women, one of whom was wearing a hijab.<sup>258</sup> The slogan "keep Portland weird," is popular throughout the state's largest city, which boasts the World Naked Bike Ride and a vegan strip club, and is home to a significant number of anarchists.<sup>259</sup> Oregon has none of the major abortion restrictions, like waiting periods, mandated parental involvement, or limitations on publicly funded abortions, which are commonly found across the country.<sup>260</sup>

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<sup>253</sup> *Brief History of Montana*, MONTANA.GOV, [https://mt.gov/discover/brief\\_history.aspx](https://mt.gov/discover/brief_history.aspx) [<https://perma.cc/H2UH-WNSD>].

<sup>254</sup> *Id.*

<sup>255</sup> Kirk Siegler, *Descending On A Montana Town, Neo-Nazi Trolls Test Where Free Speech Ends*, NPR, (Jan. 23, 2018), <https://www.npr.org/2018/01/23/579884628/victims-of-neo-nazi-troll-storm-find-difficulties-doing-something-about-it> [<https://perma.cc/AMB4-TCXG>].

<sup>256</sup> Matt Volz, *Backlash Over Border Agency Lawsuit Forces Montana Women to Leave Town*, TIME (Sept. 20, 2019), <https://time.com/5682949/montana-border-patron-spanish-video-lawsuit/> [<https://perma.cc/4GYV-XZRZ>].

<sup>257</sup> Christina Capatides, *Portland's racist past smolders beneath the surface*, CBS NEWS (Oct. 29, 2017), <https://www.cbsnews.com/news/portland-race-against-the-past-white-supremacy/> [<https://perma.cc/8ACT-G9A8>]; see also DeNeed L. Brown, *When Portland banned blacks: Oregon's shameful history as an 'all-white' state*, THE WASHINGTON POST (June 7, 2017), <https://www.washingtonpost.com/news/retropolis/wp/2017/06/07/when-portland-banned-blacks-oregons-shameful-history-as-an-all-white-state/> [<https://perma.cc/QT6R-QQDN>] (The "Lash Law" was quickly amended and then repealed. No black people were ever lashed under the law.).

<sup>258</sup> *Id.*

<sup>259</sup> See Doug Brown, *Get to Know an Anarchist*, PORTLAND MERCURY (May 17, 2017), <https://www.portlandmercury.com/news/2017/05/17/19017371/get-to-know-an-anarchist> [<https://perma.cc/GH8B-MN8D>].

<sup>260</sup> *State Facts About Abortion: Oregon*, GUTTMACHER INSTITUTE, <https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-oregon> [<https://perma.cc/2TNZ-YPA9>].

### A. State of Alabama Policy

Alabama's policy regarding gender marker alteration on identity documents and driver licenses is among the strictest in the United States. The National Center for Transgender Equality grades Alabama—along with eight other states—an “F” for requiring proof of surgery, a court order, or an amended birth certificate to change a gender marker on a state-issued identity document.<sup>261</sup> There is no simplified form and there is no “X” option for nonbinary or gender nonbinary individuals.

According to the Alabama Law Enforcement Agency (ALEA) Medical Unit, an individual wishing to change their gender marker must provide a letter from the physician who performed GCS stating that they are the surgeon and that surgery has been completed.<sup>262</sup> The letter must also state that the individual is currently living life in the specified gender. Alternatively, the individual can provide an amended certified birth certificate; however, to amend a birth certificate in Alabama, an individual must prove that their sex has been “changed by surgical procedure” and that their name has been changed,<sup>263</sup> meaning an individual born in Alabama has no choice but to procure expensive, invasive surgery to change their driver license gender marker.

Requiring proof of surgery in the form of a letter written by the surgeon places an undue burden on individuals in Alabama who seek a gender marker change on their state-issued identity documents. As asserted previously, demanding this “burdensome requirement of specific gender-affirming surgeries” before an individual can update the sex designation stops individuals of trans experience and nonbinary individuals from obtaining accurate identity documents because they are forced to undergo “expensive, invasive, and often sterilizing procedures.”<sup>264</sup> This type of hurdle during the transition process can impede full transition and has the potential to be a prohibitive factor for many individuals of lower socioeconomic status.

The state makes matters worse for individuals of trans experience and nonbinary individuals by not advertising gender marker change information clearly on its website. There is information about how to proceed with a name change (“present valid name change documents (e.g., marriage certificate, divorce decree, court order or legal name change document), along with proof that [the individual’s] name has been changed with the Social Security Administration.”).<sup>265</sup> However, there is no similar informative paragraph for gender marker changes.

### B. State of Montana Policy

Montana's policy is average in its level of difficulty; however, the NCTE gives Montana a D rating for its “[u]nclear, unknown or unwritten policy” on state-issued identity document gender

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<sup>261</sup> See HOW TRANS-FRIENDLY IS THE DRIVER’S LICENSE GENDER CHANGE POLICY IN YOUR STATE?, *supra* note 27.

<sup>262</sup> Information regarding the Alabama state policy was confirmed via Telephone Call with Medical Unit (Sept. 29, 2017).

<sup>263</sup> *ID Documents Center: Alabama*, NATIONAL CENTER FOR TRANSGENDER EQUALITY, <http://www.transequality.org/documents/state/alabama> [https://perma.cc/77JT-GA2Z].

<sup>264</sup> Wipfler, *supra* note 40, at 509 (discussing New York City’s policy change to remove the requirement of specific gender-affirming surgeries for changing the sex designation on a birth certificate).

<sup>265</sup> *Driver License Forms*, ALABAMA LAW ENFORCEMENT AGENCY, <https://www.alea.gov/dps/driver-license/driver-license-forms> [https://perma.cc/Q8NW-PYTY].

marker changes.<sup>266</sup> According to Patrick McJannet, the Driver Services Deputy Bureau Chief, to change a gender marker on a Montana driver license or identification card, an individual must bring a letter from their doctor stating that the individual is in the process of – or has completed the process of – changing their gender.<sup>267</sup> Whether this “doctor” must be a medical doctor or can be a mental health professional is unclear.

Like Alabama, Montana’s policy is not clearly stated on its website and, until recently, false information—likely because of Montana’s own undersupply of information—was listed on the National Center for Transgender Equality’s ID Documents Center: “In order to update name and/or gender on a Montana ID, the applicant must submit a certified copy of a name change order and/or a birth certificate or court order certifying the gender change.”<sup>268</sup> While it is true that the name change requirements are similar to Alabama’s as they pertain to individuals of trans experience, (submit a decree or judgment granting a name change from a court of competent jurisdiction at a driver exam station and pay the applicable fees)<sup>269</sup> this is not the case for gender marker changes.

In the past, the state of Montana may have required surgery to be performed before an individual could change their gender marker, as information suggesting such a requirement is widely obtainable: the American Association of Motor Vehicle Administrators’ Resource Guide on Gender Designation on Driver’s Licenses and Identification Cards states that surgery is required before a gender marker will be changed on a Montana identity document.<sup>270</sup> The current requirement that an individual provide a letter from their doctor stating that the individual is in the process of— or has completed the process of—changing their gender is considerably less burdensome. While individuals of trans experience who seek HRT will likely have seen a mental health professional to obtain a letter corroborating their commitment to transition, and many who seek surgery will have received such a letter from their medical doctor in order to secure a surgery date for GCS, this step is nonetheless onerous and one not imposed on cisgender individuals going through any outward physical change.

### C. State of Oregon Policy

Oregon provides the easiest path for individuals of trans experience and nonbinary people to update the gender markers on their state-issued identity documents. An applicant simply goes to a DMV office in Oregon, turns in a completed application for gender marker change, and pays the renewal or replacement fee.<sup>271</sup> As previously noted, the options now available to Oregonians are M

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<sup>266</sup> HOW TRANS-FRIENDLY IS THE DRIVER’S LICENSE GENDER CHANGE POLICY IN YOUR STATE?, *supra* note 27.

<sup>267</sup> Information regarding Montana’s policy was confirmed via email with Patrick McJannet, Driver Services Deputy Bureau Chief, on August 8, 2017.

<sup>268</sup> *ID Documents Center: Montana*, NATIONAL CENTER FOR TRANSGENDER EQUALITY, <http://www.transequality.org/documents/state/montana> [<https://perma.cc/A3EV-S5MM>]. After email correspondence with NCTE’s State Policy Counsel, the website was updated with the current information provided by the Montana Driver Services Deputy Bureau Chief.

<sup>269</sup> *Changing Your Name on Your Driver License or ID Card*, MONTANA DEPARTMENT OF JUSTICE, MOTOR VEHICLE DIVISION, <https://dojmt.gov/driving/driver-licensing/#DLID21> [<https://perma.cc/339G-KLE2>].

<sup>270</sup> GENDER DESIGNATION WORKING GROUP, *supra* note 148.

<sup>271</sup> *Changing Your Sex Identifier on Your Driver License or ID Card*, OREGON DRIVER AND MOTOR VEHICLE



(male), F (female), and X (nonbinary or not specified). The NCTE accordingly awards Oregon its highest grade, an A+, for offering a “[g]ender-neutral option, [with] no provider certification required.”<sup>272</sup>

The state of Oregon has recently updated other policies regarding gender identity. For example, HB 2673, which went into effect on January 1, 2018, simplifies the process for individuals aiming to change their name and/or gender designator on their birth certificate. Under the new law, individuals may either submit a court order for a gender change or simply submit a request to the state registrar to change the gender listed on their birth certificate, attesting that the request is “for the purpose of affirming the applicant’s gender identity.”<sup>273</sup>

Oregon’s new policy is not only the simplest, but it also allows for the most accurate information to be presented on each Oregonian’s identity card or driver license. Individuals of trans experience and nonbinary individuals who, for personal or financial reasons, have not seen a medical or mental health professional, will no longer have to take that onerous step. In one efficient move, individuals fill out an application—on which they can also list their new legally changed names—go to a DMV office, and pay a renewal or replacement fee. The state has simplified the process for those seeking a gender marker change by also making its new policy accessible on the DMV website, with an easy link to it from the main DMV landing page.<sup>274</sup>

## V. PROPOSED SOLUTIONS

As preceding sections have thoroughly explored, people disclose their gender via gender markers on government identity documents on a daily basis. The “ubiquity of sex as a mandatory field on forms required for everything from college applications to public assistance” reinforces the idea that sex is a fundamental ordering characteristic.<sup>275</sup> However, for many years, scholars have been asserting that gender is “not very helpful in confirming a person’s identity,”<sup>276</sup> and that, in fact, it is “a poor biometric identifier.”<sup>277</sup> Assuming that governments have a reasonable interest in maintaining accurate identification of their citizens, “sex designations provide only marginal utility in comparison to other more accurate technological methods, such as biometrics like fingerprints, retinal scans, facial recognition, and DNA samples.”<sup>278</sup> Even without using these advanced forms of technology, “the advent of digital photographs on DMV IDs makes obsolete any purpose that the gender marker may have initially served.”<sup>279</sup> Thus, some scholars have argued, the gender marker

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SERVICES, [http://www.oregon.gov/ODOT/DMV/Pages/driverid/chg\\_gender\\_designation.aspx](http://www.oregon.gov/ODOT/DMV/Pages/driverid/chg_gender_designation.aspx) [https://perma.cc/S979-WELD]. See App. for Application.

<sup>272</sup> HOW TRANS-FRIENDLY IS THE DRIVER’S LICENSE GENDER CHANGE POLICY IN YOUR STATE?, *supra* note 27.

<sup>273</sup> H.B. 2673, 79th Leg. Assemb., Reg. Sess. (Or. 2017), at § (1)(3)(a)(B)(ii) and (1)(3)(b)(B)(ii), <https://olis.leg.state.or.us/liz/2017R1/Downloads/MeasureDocument/HB2673/Enrolled> [https://perma.cc/FCB9-7QDX].

<sup>274</sup> OREGON DRIVER AND MOTOR VEHICLE SERVICES, *supra* note 271.

<sup>275</sup> Wipfler, *supra* note 40, at 505; see also SPADE, *supra* note 155, at 141.

<sup>276</sup> James McGrath, *Are You a Boy or a Girl? Show Me Your REAL ID*, 9 NEV. L.J. 368, 370 (2009).

<sup>277</sup> *Id.* at 404.

<sup>278</sup> *Id.* at 370, 404; see also Wipfler, *supra* note 40, at 505 (explaining that India had already begun implementing these biometric approaches in its national identification systems).

<sup>279</sup> Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 807 (2008).

“serves only to preserve the normative view of sex to the detriment of anyone who is gender variant.”<sup>280</sup>

Administrative states “systematically oppress” individuals of trans experience and nonbinary individuals by requiring gender designation on all forms of identification based “purely on the circular logic that it must be required.”<sup>281</sup> Even those states that have acknowledged the diversity of gender still “presume its necessity and utility as a data point capable of accurate classification.”<sup>282</sup> After the Oregon DMV received the order from the Multnomah County court that Jamie Shupe was to be recognized as nonbinary, it held a public comment period from April first to May 12<sup>th</sup>, 2017. The DMV also held two hearings in Eugene and Portland, collecting a total of 83 written and oral comments, 71 of which favored making the change.<sup>283</sup> At least one of those comments raised the concern that a license with an “X” marker would make it more difficult for police or others to identify individuals. Lambda Legal addressed this concern in a public statement during the comment period, asserting that “there is no evidence to support arguments that making non-binary gender markers available will negatively affect public safety.”<sup>284</sup> The organization stated that, to the contrary, “numerous foreign countries and U.S. municipalities have moved beyond binary gender designations without reporting attendant upticks in fraud or crime.”<sup>285</sup>

If a gender marker is not really necessary to identify an individual, or at least is not the best way to identify an individual, it is essential to determine what the best method is. Oregon’s policy is unquestionably the most respectful to individuals as well as the most encouraging of state and individual interests and is thus worth following, although there are narrower and more dramatic options laid out below. As explicated above, individuals of trans experience already face a number of barriers during transition, and most nonbinary individuals are not likely to obtain any form of surgery, making many current state policies unduly burdensome for them. If all states followed one or more of the solutions proposed in the following subsections, there would be more consistency among individuals who reside in different states but live in similar situations. The solutions proposed herein are also closer to the State Department’s current policy than many current state policies, meaning there would be more consistency among government-provided documents held by Americans.

#### *A. Appearance-Based Policy*

The *K.L. v. State Dep’t of Admin.* court agreed with the plaintiff that “a licensing policy based on the appearance of one’s physical features concealed from public view can undermine the accuracy of identification of individuals based on driver’s licenses.”<sup>286</sup> Allowing individuals to change the description of features such as weight, height, hair color, and eye color, indicates that a policy based on appearance is reasonable, as it concerns those physical features which are visibly

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<sup>280</sup> McGrath, *supra* note 276, at 404.

<sup>281</sup> Wipfler, *supra* note 40, at 505.

<sup>282</sup> *Id.* at 506.

<sup>283</sup> Segal, *supra* note 18.

<sup>284</sup> Lambda Legal Comment, *supra* note 156, at 10.

<sup>285</sup> *Id.*

<sup>286</sup> *K.L.*, 2012 WL 2685183, *supra* note 16, at \*7.

expressed to the public.<sup>287</sup> Accordingly, categorizing gender with visible physical features would allow for more accurate identification of individuals using their driver licenses.

The *K.L. v. State Dep't of Admin.* court appropriately acknowledged that an individual's gender marker reflects physical features that are, of course, not observable by the public. When individuals of trans experience are barred from changing their sex designation, their identity documents "inaccurately describe the discernable appearance of the license holder by not reflecting the holder's lived gender expression of identity."<sup>288</sup> As previously discussed, this creates a problem when such individuals furnish their identity documents to any number of third parties for identification purposes: the third party may conclude that the furnisher is not the person described on the document.<sup>289</sup> Individuals should thus be able to change their gender markers with the same ease as changing their weight, height, or hair color.

### B. Self-Affirmation

A policy of self-affirmation would work harmoniously with a policy of allowing identity document alterations based on changes in appearance. It is highly probable that state interests in accuracy, consistency and preventing fraud would be served well enough by allowing individuals to affirm their own genders. As noted in the Introduction, many countries have allowed individuals to self-identify and have provided a third gender option. Further, many U.S. municipalities that issue municipal identification cards are now allowing gender designations besides male or female.<sup>290</sup> Finally, the trailblazing jurisdictions of Oregon, California, and Washington D.C. have not reported any issues with fraud. According to Lambda Legal "these policies render identity documents more accurate, inclusive and affirming for individuals who do not identify as male or female."<sup>291</sup>

Self-affirmation not only furthers the state interests of accuracy and consistency, but it also saves individuals significant amounts of money. States like Alabama, which require an individual to complete GCS before they can obtain a revised identity document, pressure individuals of trans experience to obtain costly surgery they may not even want. States that require a doctor's letter, which declares that the individual has completed "appropriate clinical treatment," still force individuals to find a medical provider and make multiple visits. Even the standardized forms used by many states require individuals to seek out a medical or mental health professional to fill out half the form.

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<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> Vicky Gan, *How Municipal ID Cards Make Cities More Inclusive*, THE ATLANTIC (June 4, 2015), <http://www.citylab.com/politics/2015/06/how-municipal-id-cards-make-cities-more-inclusive/394826/> [<https://perma.cc/48WH-RNPT>].

<sup>291</sup> Lambda Legal Comment, *supra* note 156, at 16; *see also* CENTER FOR POPULAR DEMOCRACY, WHO WE ARE: MUNICIPAL ID CARDS AS A LOCAL STRATEGY TO PROMOTE BELONGING AND SHARED COMMUNITY IDENTITY 11–22 (2013), <https://populardemocracy.org/sites/default/files/municipal%20id%20report.pdf> [<https://perma.cc/MBJ4-56DN>] (detailing the experiences of states and municipalities across the United States that have implemented municipal ID cards).

### C. Removal of Gender Markers

As explored throughout this paper, states may have legitimate reasons for knowing an individual's sex and/or gender. However, it may not be necessary for a gender marker to appear on an individual's identity document for all third parties to see. *The Yogyakarta Principles plus 10* (YP+10) urges states to adopt this method, advising states to “[e]nsure that official identity documents only include personal information that is relevant, reasonable and necessary as required by the law for a legitimate purpose, and thereby end the registration of the sex and gender of the person in identity documents such as birth certificates, identification cards, passports and driver licenses, and as part of their legal personality.”<sup>292</sup> Perhaps some type of “below-the-line” option is possible: the state would still acquire an individual's gender information but would not publish it on their identity document. This replicates the “line” on birth certificates that separates identifying information from administrative, medical, and health information, which first appeared in 1949 and is still in use.<sup>293</sup> Professor Elizabeth Reilly has already called for such a “radical tweak” to U.S. birth certificates, suggesting that the next revision should relegate sex information to the non-identifying medical/statistical section.<sup>294</sup>

## VI. CONCLUSIONS

When only 11% of respondents<sup>295</sup> to a survey polling 27,715 individuals<sup>296</sup> say that all of their identity documents display the name they prefer and the gender with which they identify, there is clearly a problem with access to a process for obtaining accurate identity documents. Individuals of trans experience must be able to alter the gender markers on their government-issued identity documents if they are going to keep their transgender status private. Even if the state has an interest in knowing that an individual is transgender or nonbinary, this information does not need to be disclosed on an identity document. The state's interest in gender should never outweigh an individual's interest in their own body and privacy.

Individuals of trans experience and nonbinary individuals already face higher rates of harassment and violence than cisgender individuals, so inaccurate identity documents only increase the likelihood of human rights violations. Individuals of all genders regularly change their outward physical appearance, and this new information is usually not required to be accompanied by a medical or mental health professional's signature. It is a burden only individuals of trans experience and nonbinary individuals face, meaning they are treated differently than their similarly-situated cisgender counterparts.

Oregon's process of self-affirmation should be followed by all states and the federal government, as it is the fairest to individuals and has also been proven effective at achieving the state's interests. The policy removes the burden of undergoing unwanted surgery or hormone

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<sup>292</sup> THE YOGYAKARTA PRINCIPLES PLUS 10 (YP+10), *supra* note 6, at 9.

<sup>293</sup> CENTERS FOR DISEASE CONTROL AND PREVENTION - NATIONAL CENTER FOR HEALTH STATISTICS, U.S. VITAL STATISTICS SYSTEM: MAJOR ACTIVITIES AND DEVELOPMENTS, 1950–95 7 (1997), <https://www.cdc.gov/nchs/data/misc/usvss.pdf> [<https://perma.cc/3QAX-WUXY>].

<sup>294</sup> See generally Elizabeth Reilly, *Radical Tweak & Relocating the Power to Assign Sex*, 12 CARDOZO J. L. & GENDER 297, 308 (2005).

<sup>295</sup> THE 2015 SURVEY, *supra* note 2, at 7.

<sup>296</sup> *Id.* at 2.

therapy, or of finding a medical or mental health provider. However, a policy shift toward removing gender markers altogether from state and federal identity documents may be the simplest from an administrative point of view.

## APPENDIX

**Change of Gender Designation Request**

Use this form to request a gender designation change on your Washington driver license, instruction permit, identification (ID) card, enhanced driver license, or enhanced ID card.

Complete the Applicant section and have the medical provider or social service worker familiar with your treatment complete the Medical or social service provider section.

To speed up processing, take this completed form with your Washington driver license, instruction permit, ID card, enhanced driver license, or enhanced ID card to any driver licensing office. Or mail this form and a photocopy of your license, permit, or ID card to:

**Programs and Services, Record Response**  
**Department of Licensing**  
**PO Box 9030**  
**Olympia WA 98507-9030**

If mailed in, we will notify you when your request has been processed.

**Incomplete requests will not be processed.**

**Applicant**

TYPE or PRINT Name as it appears on your current driver license or ID card ( <i>Last, First, Middle</i> )		Driver license or ID card number
(Area code) Daytime telephone number	Email	If request is mailed, notify me by <input type="checkbox"/> Email <input type="checkbox"/> U.S. mail
Answer the following What gender designation would you like on your driver license or ID card? ..... <input type="checkbox"/> Male <input type="checkbox"/> Female		
I authorize the licensed medical provider below to release information related to this request.  <div style="text-align: right;"> <b>X</b>            Applicant signature         </div>		


**Medical or social service provider**

ONLY a licensed physician, psychiatrist, psychologist, naturopath, advanced registered nurse practitioner, physician assistant, certified osteopathic physician assistant, or social service worker familiar with your treatment may complete this section.

Provider name as it appears on your license		Title
Professional license number	Expiration date	Issuing state/jurisdiction
Hospital or clinic name		
(Area code) Telephone number	Email	
Answer the following What is the gender identification of this applicant? ..... <input type="checkbox"/> Male <input type="checkbox"/> Female		
I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.  <div style="text-align: right;"> <b>X</b>            Provider signature         </div>		
Date and place (city or county) signed		


<b>APPLICATION FOR DRIVING PRIVILEGES OR ID CARD</b>											
<input type="checkbox"/> ORIGINAL <input type="checkbox"/> RENEWAL <input type="checkbox"/> REPLACEMENT											
<b>DRIVER LICENSE</b> <input type="checkbox"/> CLASS C <input type="checkbox"/> CLASS C RESTRD		<b>LT CONVERT</b> <input type="checkbox"/>		<b>INSTRUCTION PERMIT</b> <input type="checkbox"/> CLASS C <input type="checkbox"/> MOTORCYCLE		<b>ENDORSEMENT</b> <input type="checkbox"/> MC <input type="checkbox"/> MC-3 <input type="checkbox"/> FARM		<b>ID CARD</b> <input type="checkbox"/>		<b>AT-RISK</b> <input type="checkbox"/>	
LAST NAME (PRINT NAME)				FIRST NAME		MIDDLE NAME		SOCIAL SECURITY NUMBER			
OREGON DRIVER / ID NUMBER		DATE OF BIRTH (M-D-Y)		MOTHER'S MAIDEN NAME		APPLICANT'S PLACE OF BIRTH (CITY & STATE OR COUNTRY)					
<b>RESTRICTIONS</b>		Do you want your license or ID card to show <input type="checkbox"/> YES that you are an anatomical donor? <input type="checkbox"/> NO				HEIGHT FT.    IN.		WEIGHT LBS		SEX (CIRCLE)    HAIR COLOR    EYE COLOR M    F    X	
<b>RESIDENCE ADDRESS</b>						<b>MAILING ADDRESS (IF DIFFERENT FROM RESIDENCE ADDRESS)</b>					
CITY, STATE, ZIP CODE						CITY, STATE, ZIP CODE					
<b>CURRENT OR PREVIOUS MILITARY SERVICE:</b> By checking this box I authorize DMV to send my name and address to the Oregon Department of Veterans' Affairs (ODVA) for the purpose of receiving benefit information. <input type="checkbox"/>											
<b>NOTE:</b> Voter registration forms are available at the DMV office. If you would like to register to vote today; please ask a DMV clerk.											
Have you ever been issued a driver license, permit or ID card in another state or country? <input type="checkbox"/> YES* <input type="checkbox"/> NO											
*If YES, from what state or country was the most recent license or permit issued? _____ and in what name was it issued? _____											
<input type="checkbox"/> Same or <input type="checkbox"/> Other: _____ Number (if known): _____											
Have you ever been issued an Oregon driver license, permit or ID card? <input type="checkbox"/> YES* <input type="checkbox"/> NO											
*If YES, in what name? <input type="checkbox"/> Same or <input type="checkbox"/> Other: _____ Number (if known): _____											
Are your driving privileges currently suspended or revoked in Oregon or another state? <input type="checkbox"/> YES* <input type="checkbox"/> NO *If YES, why? _____											
You are required to report any mental or physical condition or impairment that affects your ability to drive safely. You are not required to report all your health conditions – only those that affect your ability to drive safely. DMV will use your answers to the following questions only for the purpose of determining your eligibility for an Oregon driving privilege. If you have a condition or impairment that makes you unable to safely operate a motor vehicle, you are not eligible for a driving privilege until you have provided additional medical information and/or passed DMV tests. <b>If you answer "Yes" to any one of the questions below, we will not be able to issue you a license at this time.</b>											
1) Do you have a vision condition or impairment that has not been corrected by glasses, contacts or surgery that affects your ability to drive safely? <input type="checkbox"/> YES <input type="checkbox"/> NO											
2) Do you have any physical or mental conditions or impairments that affect your ability to drive safely? <input type="checkbox"/> YES* <input type="checkbox"/> NO											
*If Yes: a) What is the condition or impairment?: _____											
b) Describe how this affects your ability to drive safely: _____											
3) Do you use alcohol, inhalants, or controlled substances to a degree that affects your ability to drive safely? <input type="checkbox"/> YES* <input type="checkbox"/> NO											
*If Yes: Describe how your use affects your ability to drive safely: _____											
By signing this application, I certify that all documentation and information I provided to DMV is true and correct. I understand it is a crime to knowingly make a false application for driving privileges or ID card. The offense is a class A misdemeanor and is punishable by jail time, a fine or both. DMV will cancel and/or suspend my permit, driver license or ID if I make a false statement or present false documentation.											
I am a resident of or domiciled in Oregon as described in ORS 807.062		<b>IF under 18 years of age:</b>		And applying for first driving privilege, applicant meets school enrollment requirements under ORS 807.066 or has a diploma or GED (proof of diploma or GED required). And applying for first Class C license, applicant has completed driving experience requirements under ORS 807.065(1)(2): 50 hours and Driver Education, or 100 hours, or has a valid license from another state. Signature of applicant's mother or father whose parental rights have not been terminated or legal guardian.							
<b>SIGNATURE OF APPLICANT:</b>											
<div style="display: flex; justify-content: space-between; align-items: center;"> <span style="font-size: 2em;">X</span> <span style="font-size: 2em;">X</span> </div>											
<b>SSN:</b> Disclosure of your Social Security number (SSN) is mandatory for issuance, renewal or replacement of your driver license or identification card under ORS 807.021(1).											
<b>STOP - DO NOT WRITE IN THE AREA BELOW - FOR DMV OFFICE USE ONLY</b>											
<b>OUTSTANDING REQUIREMENTS</b>				<b>DATE RECEIVED</b>		<b>TSR ID</b>		<b>VISION / HEARING</b>			
<input type="checkbox"/> LP or ADDRESS <input type="checkbox"/> REIN. FEE/SR-22 <input type="checkbox"/> OTHER: _____								VISION: <input type="checkbox"/> OK <input type="checkbox"/> OK W/BIOPTIC    HEARING: <input type="checkbox"/> GOOD <input type="checkbox"/> DEAF <input type="checkbox"/> OK/WCL    LENSES <input type="checkbox"/> F RESTRICTION <input type="checkbox"/> G RESTRICTION    DATE    TSR ID REFERRED: <input type="checkbox"/> ACUITY <input type="checkbox"/> F.O.V.			
<b>KNOWLEDGE TEST</b>								<b>DRIVE TEST</b>			
DATE STAMP		TEST		SCORE		TSR ID		DATE		CLASS SCORE TSR ID	
								1			
								2			
								3			
<b>DOCUMENTS PRESENTED</b>				<b>DOCUMENTS PRESENTED</b>				<b>DOCUMENTS PRESENTED</b>			
<input type="checkbox"/> US BIRTH CERTIFICATE/PASSPORT/PASSPORT CARD <input type="checkbox"/> FOREIGN PASSPORT & DHS DOC. or ADMIT. STAMP <input type="checkbox"/> DHS DOCUMENT <input type="checkbox"/> OTHER (Specify) _____				<input type="checkbox"/> US BIRTH CERTIFICATE/PASSPORT/PASSPORT CARD <input type="checkbox"/> FOREIGN PASSPORT & DHS DOC. or ADMIT. STAMP <input type="checkbox"/> DHS DOCUMENT <input type="checkbox"/> OTHER (Specify) _____				<input type="checkbox"/> US BIRTH CERTIFICATE/PASSPORT/PASSPORT CARD <input type="checkbox"/> FOREIGN PASSPORT & DHS DOC. or ADMIT. STAMP <input type="checkbox"/> DHS DOCUMENT <input type="checkbox"/> OTHER (Specify) _____			
<input type="checkbox"/> LP=C <input type="checkbox"/> LP=F <input type="checkbox"/> LP=P <input type="checkbox"/> LP=U				<input type="checkbox"/> LP=C <input type="checkbox"/> LP=F <input type="checkbox"/> LP=P <input type="checkbox"/> LP=U				<input type="checkbox"/> LP=C <input type="checkbox"/> LP=F <input type="checkbox"/> LP=P <input type="checkbox"/> LP=U			
DATE		TSR ID		2nd CHECK		DATE		TSR ID		2nd CHECK	
						DATE STAMP		FEE		TSR ID	
								\$			

MVD - 10237  
INT. 07/10



**New Mexico Taxation & Revenue Department, Motor Vehicle Division**

## GENDER DESIGNATION CHANGE REQUEST



Use this form to request a change to the gender designation on your New Mexico Driver's License (DL) or Identification Card (ID), or if you are applying for a first-time New Mexico DL or ID and are requesting a change of gender designation from that shown on your current identification documents. If you are also changing your name, please provide both current/prior and new name with appropriate original documentation (court order, marriage certificate or divorce decree). This form must be completed in full by you and your medical or social service provider.

Applicant Information and Request for Change of Gender Designation			
Applicant's current/prior full legal name:			
Last name	First name	Middle name(s)	
If changing name, Applicant's new full legal name:			
Last name	First name	Middle name(s)	
Residence street address	City	State	ZIP code
Driver's license or ID number	Telephone number	Email address	
<p><b>Gender Designation Statement:</b></p> <p>I, _____, wish the gender designation on my Driver's License/ID Card to designate my gender as (circle one):    Male (M)    Female (F).</p> <p>I hereby swear, under the penalty of perjury, that this request for the selected gender designation to appear on my Driver's License/ID Card is for the purpose of ensuring that my Driver's License/ID Card accurately reflects my gender identity and is not for any fraudulent or other unlawful purpose.</p> <p>Signature _____ Date _____</p>			
Medical or Social Service Provider Information and Certification			
Last name	First name	Title	
Provider's organizational name (if applicable)			
Provider's street address	City	State	ZIP code
Telephone number	Email address	Professional license number and state	
<p>I am licensed as a:    <input type="checkbox"/> Physician    <input type="checkbox"/> Therapist or Counselor    <input type="checkbox"/> Psychiatric Social Worker</p> <p><input type="checkbox"/> Other (please describe) _____</p> <p>My practice includes the treatment and counseling of persons with gender identity issues, including the Applicant named herein, and in my professional opinion the applicant's gender identity is (circle one):    Male    Female    and can reasonably be expected to continue as such for the foreseeable future.</p> <p>I hereby certify, under the penalty of perjury, that the foregoing information is true and correct.</p> <p>Signature _____ Date _____</p>			